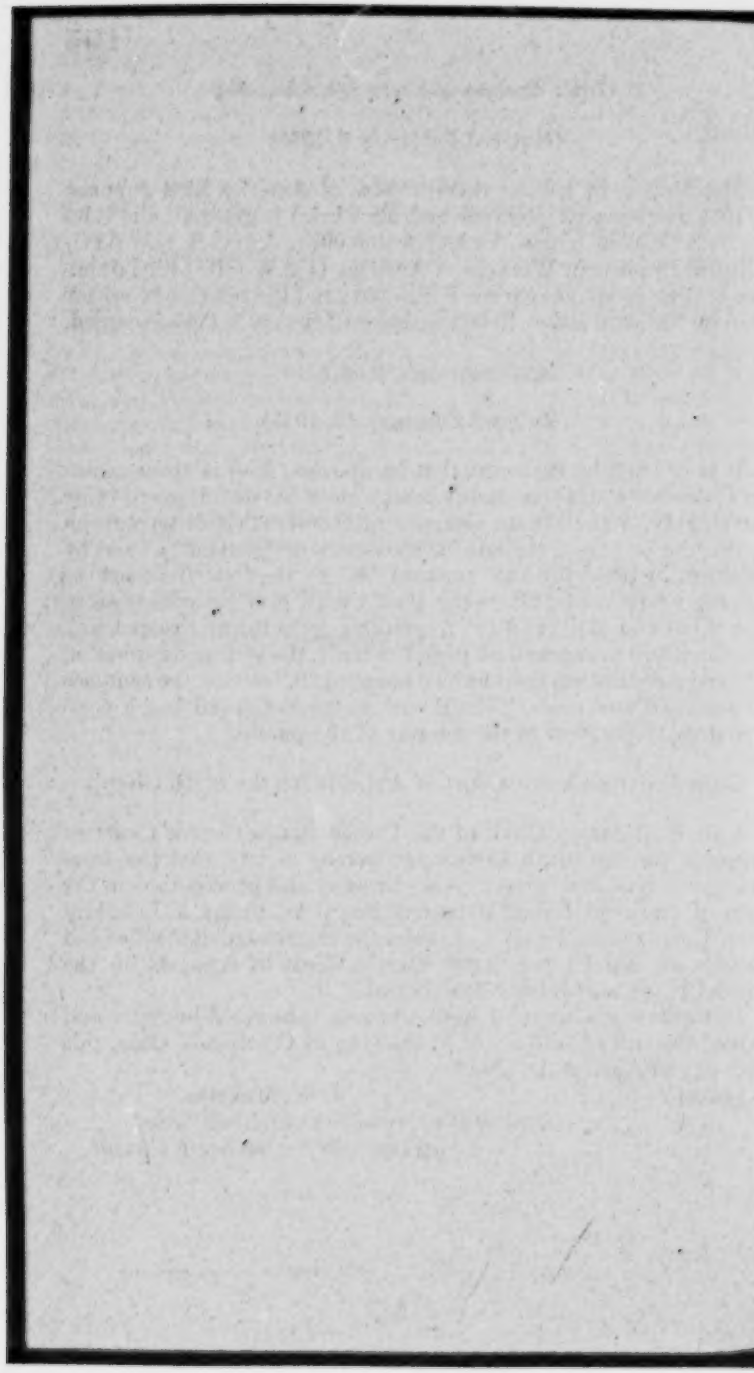

No. 1238

APPENDIX TO PETITIONER'S BR

FILED
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CHARLES ELMORE CROPLEY
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IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 8669

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

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FILED
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KENNETH J. CARRICK
CLERK

The Gunthorp-Warren Printing Co., Chicago—9-5-44—55

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner,
vs.
E. C. Atkins and Company,
Respondent.
} 8669.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151, *et seq.*), respectfully petitions this Court for the enforcement of its order against respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683, Case No. 9-B-1200," and, "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, Case No. 9-C-1982."

In support of this petition, the Board respectfully shows:

(1) Respondent is an Indiana corporation, engaged in business in the State of Indiana, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board, on May 30, 1944,

issued a decision and order directed to the respondent, and its officers, agents, successors, and assigns.

The aforesaid order provides as follows:

Order.

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, ex-

cluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout its two Indianapolis plants, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Ninth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(3) On May 30, 1944, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Messrs. Barnes, Hickam, Pantzar & Boyd, 1313 Merchants Bank Building, Indianapolis, 4, Indiana, respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole

said order of the Board, and requiring respondent, and its officers, agents, successors, and assigns, to comply therewith.

National Labor Relations Board,
/s/ Malcolm F. Halliday,
/s/ Malcolm F. Halliday,
Associate General Counsel.

Dated at Washington, D. C., this 24th day of August, 1944.

District of Columbia } ss.

Malcolm F. Halliday, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

/s/ Malcolm F. Halliday,
Associate General Counsel.

Subscribed and sworn to before me this 24th day of August, 1944.

/s/ John E. Lawyer,
(Seal) *Notary Public, District of Columbia.*

My Commission Expires August 31, 1944.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

CHARGE.

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that E. C. Atkins and Company at Plant No. 1—402 South Illinois Street, Plant No. 2—21st and Northwestern, Indianapolis, Indiana employing 56 workers in Guard Duty has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that on December 20, 1943 it, by letter through its officers and agents, refused to bargain collectively with the authorized representatives of the International Association of Machinists, District 90, and their affiliated Local 1683 affiliated with the American Federation of Labor, a labor organization chosen by a majority of the plant guards at the company's two Indianapolis Plants, excluding the Chief and Lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline and otherwise effect changes in the status of employees or effectively recommend such action, in an election held under the auspices of the National Labor Relations Board on November 17, 1943, for collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

By the act set forth in the paragraph above, it, by its

officers and agents has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

International Association of Machinists, District 90 and Their Affiliate Local 1683, affiliated with the American Federation of Labor,
by: Frank M. Richardson,
by: Frank M. Richardson,
Business Representative.
49½ South Delaware Street,
Indianapolis, Indiana.
MA. 8103.

Subscribed and sworn to before me this 22nd day of December, 1943, at Indianapolis, Indiana.

John C. Getreu,
John C. Getreu,
Field Examiner, Ninth Region.

BOARD EXHIBIT NO. 101-A.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

COMPLAINT.

It having been charged by International Association of Machinists, District 90, and their affiliate Local 1683, 49½ South Delaware Street, Indianapolis, Indiana, affiliated with the American Federation of Labor, herein called the Union, that E. C. Atkins and Company, Indianapolis, Indiana, herein called the respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, herein called the Act, the National Labor Relations Board, by the Acting Regional Director for the Ninth Region, as agent of the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations—Series 3, Article IV, Section 1, hereby issues its complaint and alleges as follows:

1. E. C. Atkins and Company is a corporation organized and existing by virtue of the laws of the State of Indiana, with its principal office and places of business located in Indianapolis, Indiana, and has at all times herein mentioned continuously engaged at said places of business in the manufacture and sale of saws, tools, and armor plate.

2. The respondent, in the course and conduct of its business as aforesaid, causes and has continuously caused a substantial part of the materials and products used in its operations described above, to be delivered and transported in interstate commerce to its place of business in the State of Indiana, and causes and has continuously caused the greater part of the products manufactured, sold and distributed by it in its business as aforesaid, to be delivered and transported from its places of business in the State of Indiana to and through states of the United States other than the State of Indiana.

3. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

4. All plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act, as found by the National Labor Relations Board in its Decision and Direction of Election of October 19, 1943, in the matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their affiliate Local 1683, Case No. 9-R-1200.

5. On November 17, 1943, the employees in the appropriate unit described in paragraph 4 above, designated and selected the Union as their representative for the purposes of collective bargaining by a secret ballot election conducted under the supervision of the Acting Regional Director for the Ninth Region of the National Labor Relations Board, pursuant to the Decision and Direction of Election of the National Labor Relations Board of October 19, 1943, in the matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their affiliate Local 1683, Case No. 9-R-1200. On November 29, 1943, the Union was certified as the representative for the purposes of collective bargaining of the employees in the above-described appropriate unit by the National Labor Relations Board pursuant to Section 9 (c) of the Act,

notice of which certification was duly given the respondent and the Union.

6. At all times since November 17, 1943, the Union has been the representative for the purposes of collective bargaining of the employees in said unit, and by virtue of Section 9 (a) of the Act, has been and now is the exclusive bargaining agent for all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

7. On or about December 14, 1943, and on numerous occasions thereafter, the Union requested the respondent to bargain with it as the exclusive representative of the employees in the unit described in paragraph 4 above, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

8. On or about December 14, 1943, and at all times thereafter, the respondent refused, and has since continued to refuse, to bargain collectively with the Union as the exclusive representative of the employees in the unit described in paragraph 4 above.

9. By the acts described in paragraph 8 above, the respondent has engaged in and is thereby engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

10. By the acts described in paragraph 8 above, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

11. The activities of the respondent described in paragraph 8 above, occurring in connection with the operations of the respondent described in paragraphs 1 and 2 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

12. The acts of the respondent as herein above set forth constitute unfair labor practices affecting commerce within

the meaning of Section 8 (1) and (5), and Section 2 (6) and (7) of the Act.

Wherefore, the National Labor Relations Board, on this 12th day of January, 1944, issues its complaint against E. C. Atkins and Company, the respondent herein.

UNITED STATES OF AMERICA.

Before the National Labor Relations Board,

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated with the American Federation of Labor	Case No. 9-C-1982.

NOTICE OF HEARING.

Please Take Notice that on the 31st day of January, 1944, at 10:00 o'clock in the forenoon, in Room 216, Federal Building, Indianapolis, Indiana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which

are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, direct that a given exhibit need not be duplicated.

In Witness Whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Acting Regional Director for the Ninth Region on this 12th day of January, 1944.

Rosemary S. Macke,
Rosemary S. Macke,
(Seal) *Acting Regional Director, National Labor Relations Board, Ninth Region.*

BOARD EXHIBIT NO. 101-E.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD,

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

ANSWER OF RESPONDENT, E. C. ATKINS AND COMPANY.

The Respondent, E. C. Atkins and Company, for answer to the Complaint herein, alleges as follows:

1. The Respondent admits the facts alleged in paragraph 1 of the Complaint.

2. The Respondent admits the facts alleged in paragraph 2 of the Complaint.

3. The Respondent denies the facts alleged in paragraph 3 of the Complaint; and affirmatively substantiates such denial with the allegation that the members of the Union are not "employees" within the meaning of Section 2 of the National Labor Relations Act, and its various subdivisions.

4. The Respondent denies the facts alleged in paragraph 4 of the Complaint; and affirmatively substantiates such denial with the allegation that the plant guards at the two Indianapolis plants of the Respondent are not "employees" within the meaning of Section 2 of the National Labor Relations Act, and its various subdivisions, and consequently cannot constitute a unit appropriate for the purposes of collective bargaining.

5. The Respondent admits that an election by secret ballot of certain of the plant guards at the two Indianapolis plants of the Respondent was held on November 17, 1943; and further admits that on November 29, 1943, the National Labor Relations Board certified the Union as the representative, for the purposes of collective bargaining, of such plant guards; but the Respondent denies that such secret ballot election was properly conducted, or that such plant guards were "employees" of the Respondent within the meaning of the word "employee," as used in Section 2 of the National Labor Relations Act, and its various subdivisions. The Respondent also admits that notice of the certification of the National Labor Relations Board was duly given the Respondent; but has no knowledge as to whether such notice was given the Union.

6. The Respondent denies the facts alleged in paragraph 6 of the Complaint.

7. The Respondent admits the facts alleged in paragraph 7 of the Complaint, except to the extent of the conclusion inferable therefrom that the "employees" therein described were employees of the Respondent within the meaning of that word as used in Section 2 of the National Labor Relations Act, and its various subdivisions.

8. The Respondent admits the facts alleged in paragraph 8 of the Complaint, except to the extent of the conclusion inferable therefrom that the "employees" therein described were employees of the Respondent within the

meaning of that word as used in Section 2 of the National Labor Relations Act, and its various subdivisions.

9. The Respondent denies the facts alleged in paragraph 9 of the Complaint.

10. The Respondent denies the facts alleged in paragraph 10 of the Complaint.

11. The Respondent denies the facts alleged in paragraph 11 of the Complaint.

12. The Respondent denies the facts alleged in paragraph 12 of the Complaint.

13. The Respondent further alleges that the Respondent is not, and cannot be, an employer within the meaning of Section 2 of the National Labor Relations Act, or any of its subdivisions, with respect to the "plant guards" referred to in the Complaint, because all of them were "auxiliary military police" under the jurisdiction and control of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and because all such "auxiliary military police" were in the Federal Military Service at all times alleged in the Complaint.

14. The Respondent further alleges that the "employer" of the "plant guards," referred to in the Complaint, is the United States of America, and that consequently the Respondent cannot be their "employer" within the meaning of Section 2, subdivision 2 of the National Labor Relations Act.

15. The Respondent further alleges that the relationship of employer and employee, with its various incidents, has never existed as between the Respondent and the plant guards referred to in the Complaint, and that consequently the relationship between the Respondent and such plant guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act.

16. The Respondent further alleges that the Union purports to represent plant guards at various other plants in the Indianapolis area, which plant guards have not been sworn into the Military Service under the Articles of War; and the Respondent further alleges, upon information and belief, that the collective bargaining agreements executed

between the Union and the corporations at which such plant guards are stationed, respectively, contain provisions respecting seniority, discipline, handling of grievances, vacations, hours of work, and other incidents of tenure, which are incompatible with the Articles of War and military orders pursuant to which the auxiliary military police at the plants of the Respondent are subject to the jurisdiction of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and that consequently any order directing the Respondent to bargain with respect to such incidents of employment with the plant guards at the plants of the Respondent is void and of no force and effect.

17. The Respondent further alleges that the hearing, which resulted in the Decision and Direction of Election of the National Labor Relations Board, entered October 19, 1943, was held without due process of law because of the denial, in part, of the Respondent's application for subpoenas *duces tecum* directed at F. M. Richardson, the Business Representative of the Union, to produce union records, and that consequently said Decision and Direction of Election is void and of no force and effect as against the Respondent.

18. The Respondent further alleges that the Decision and Direction of Election, entered October 19, 1943, and the Certification, entered by the Board on November 29, 1943, are void, because the National Labor Relations Board denied the repeated written requests of the Respondent for permission to appear before the Board and make argument of the issues raised by the Respondent; the Respondent never having been permitted to address argument respecting the Respondent's points to any member or representative of the Board, who prepared the Decision and Direction of Election, entered October 19, 1943, or the Certification, entered November 29, 1943.

19. The Respondent further alleges that the Certification of the National Labor Relations Board, entered November 29, 1943, is based in whole upon an investigation pursuant to Section 9, Subsection (c) of the National Labor Relations Act, and that the record of such investiga-

tion (including the Petition for Certification, Proof of Service thereof, Transcript of verbal testimony, and written exhibits, briefs, Decision and Direction of Election, and final Certification) evidences a denial of due process within the meaning of the Fifth Amendment to the Constitution of the United States; and the Respondent respectfully prays leave to incorporate all the objections and exceptions in such record by reference thereto, as defenses to the Complaint.

20. The Respondent further alleges that the record of investigation, referred to in the last preceding paragraph of this Answer, and the defenses, objections, and exceptions of the Respondent therein disclosed are material to the defense of the Respondent herein; and the Respondent therefore respectfully requests the National Labor Relations Board to produce the original copy of such record at the hearing upon the Complaint.

Wherefore, the Respondent respectfully prays that the Complaint herein be dismissed.

E. C. Atkins and Company,
Respondent,
By Henry C. Atkins Jr.,
Vice-President.

Messrs. Barnes, Hickam, Pantzer & Boyd,
Attorneys for Respondent,
1313 Merchants Bank Building,
Indianapolis, Indiana.
Kurt F. Pantzer,
Lewis D. Spencer,
Of Counsel.
Dated January 27, 1944.

State of Indiana, }
County of Marion. } ss:

Henry C. Atkins, Jr., being first duly sworn, upon his oath says:

That he is a Vice-President of E. C. Atkins and Company, the Respondent in the "Answer of Respondent, E. C. Atkins and Company," which precedes this jurat; that he

has read such Answer; and that the facts therein are true as he verily believes.

Further the affiant saith not.

Henry C. Atkins Jr.

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 27th day of January, 1944.

Thelma Blessing,
Thelma Blessing,
(Seal) *Notary Public.*

My commission expires June 5, 1947.

Received Jan. 28, 1944, N. L. R. B., Ninth Region, Cincinnati.

UNITED STATES OF AMERICA.

Before the National Labor Relations Board.

In the Matter of: E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, affiliated with the American Federation of Labor.	Case No. 9-C-1982.

DECISION AND ORDER.

On February 19, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices affecting commerce, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent duly filed exceptions to the Intermediate Report

and supporting briefs. Pursuant to notice, oral argument, in which the respondent and the Union participated, was held before the Board in Washington, D. C., on May 11, 1944.

The Board has considered the rulings of the Trial Examiner, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following addition:

The respondent contends that the guards involved in this proceeding are no longer the respondent's employees, but are employees of the United States of America by reason of having become civilian auxiliaries of the Military Police. We find this contention without merit. The United States of America does not claim that the guards are its employees. On the contrary, the agreement which each guard signs with the United States of America in order to obtain or retain employment with the respondent states in part as follows:

> • • • I, [name of guard], who have been or am about to be employed by [the respondent] as a guard at [the respondent's Indianapolis plants] for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that • • • I am subject to military law during the period of my employment.

The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America. According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works "very

closely" and "cooperates" with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the "necessary pay roll deductions" before paying them their wages.

However, counsel for the respondent claimed at the oral argument before the Board that since the respondent could act for the most part only in an advisory and tentative manner, subject to the paramount approval or disapproval of the appropriate military authorities, the respondent retained virtually no control over the guards, and that there were virtually no subjects remaining on which it could bargain collectively with the guards' duly selected representative. It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act. Under the circumstances and upon the entire record, we find, as we did in the preceding representation case, that the guards are employees of the respondent.[1]

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1. See *Matter of Chrysler Corporation, Highland Park Plant*, 44 N.L.R.B. 881, 885, where we stated in part as follows:

> The War Department has recently * * * [made] plant-protection employees at plants producing war materials civilian auxiliaries of the military police. Under appropriate Army supervision, they are being trained and equipped to meet the additional responsibility placed upon them. The Company contends that, even if their ordinary duties do not bar them from rights guaranteed under the Act, this military regulation changes their employment status and that they are no longer "employees" within the meaning of the Act. We do not agree.

Order.

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or other-

wise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout the two Indianapolis plants, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Ninth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 30th day of May 1944.

Gerard D. Reilly,
Member,

John M. Houston,
Member,

(Seal) *National Labor Relations Board.*

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD,

Trial Examining Division,

Washington, D. C.

In the Matter of: E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, affiliated with the American Federation of Labor.	Case No. 9-C-1982.

Messrs. Thomas E. Shroyer and Allen Sinsheimer, Jr., for the Board.

Messrs. Kurt F. Pantzer, and Lewis D. Spencer, of Indianapolis, Indiana, for the respondent.

Messrs. F. M. Richardson, Carl Cedarquist, and William J. Layton, of Indianapolis, Indiana, and Mr. Van B. Carter, of Cincinnati, Ohio, for the Union.

INTERMEDIATE REPORT.

Statement of the Case.

Upon a charge duly filed on December 23, 1943, by the International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, herein called the Union, the National Labor Relations Board, herein called the Board, by the Acting Regional Director for the Ninth Region (Cincinnati, Ohio), issued its complaint dated January 12, 1944, against E. C. Atkins and Company, herein called the re-

spondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Sections 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. A copy of the complaint, accompanied by notice of hearing, was duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that all plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining; (2) that on November 29, 1943, the Board certified the Union as the exclusive representative of the employees of the respondent in such unit; (3) that on or about December 14, 1943, and at all times thereafter the respondent, although duly requested, refused to bargain collectively with the Union as the exclusive representative of all its employees in the said appropriate unit; and (4) that by such refusal the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On January 27, 1944, the respondent filed its answer admitting certain allegations of the complaint concerning its business operations and the proceedings of the Board leading to the certification of the Union, but denying that its plant guards are employees within the meaning of the Act and also denying that it has committed any unfair labor practices. The paragraphs from the respondent's answer which set forth its affirmative contentions are here quoted in full:

> 13. The Respondent further alleges that the Respondent is not, and cannot be, an employer within the meaning of Section 2 of the National Labor Relations Act, or any of its subdivisions, with respect to the "plant guards" referred to in the Complaint, because all of them were "auxiliary military police" under the jurisdiction and control of the Continuous Security

District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and because all such "auxiliary military police" were in the Federal Military Service at all times alleged in the Complaint.

14. The Respondent further alleges that the "employer" of the "plant guards," referred to in the Complaint, is the United States of America, and that consequently the Respondent cannot be their "employer" within the meaning of Section 2, subdivision 2 of the National Labor Relations Act.

15. The Respondent further alleges that the relationship of employer and employee, with its various incidents, has never existed as between the Respondent and the plant guards referred to in the Complaint, and that consequently the relationship between the Respondent and such plant guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act.

In its decision[1] in the representation case upon which the Board's complaint relies for the establishment of the Union's position, as the statutory representative of the employees in an appropriate unit, the Board said:

> The Company agrees with the scope of the unit but contends that such a unit is not an appropriate one since plant guards who are all auxiliaries of the military police, are not employees within the meaning of the Act. This contention has been advanced in other cases[2] and has been found untenable. • • • No facts or arguments are presented here which would warrant departing from our prior decisions; accordingly the Company's contention is rejected.

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1. *Matter of E. C. Atkins and Company* and *International Association of Machinists, District 90 and their affiliated local 1685*, 52 N.L.R.B. 1470. The entire record in this case was incorporated by reference in the instant proceeding. This fulfills the request of the respondent in paragraph 19 of its answer for "leave to incorporate all the objections and exceptions in such record by reference thereto, as defenses to the complaint."

2. The Board cited: *Matter of Chrysler Corporation, Highland Park Plant*, 44 N.L.R.B. 881; *Matter of Phelps Dodge Copper Products Corp.*, 41 N.L.R.B. 973; and *Matter of Dravo Corporation*, 52 N.L.R.B. 322.

Two other contentions advanced by the respondent in its answer have also heretofore been disposed of by the Board. The respondent contends that the Board's Decision and Direction of Election and the Certification are void, "because the [Board] denied the repeated written requests of the respondent for permission to appear before the Board and make argument of the issues raised by the respondent." The Board in its Decision denied such a request for oral argument and in disposing of the respondent's Petition for Reconsideration of the Decision again denied a request for oral argument.

Again the respondent contends in its answer that "the hearing was held without due process of law because of the denial, in part, of the Respondent's application for *subpenas duces tecum* • • • and that consequently said decision and direction of election is void and of no force and effect against the Respondent." The Board in its decision affirmed this ruling of the Trial Examiner. Hence this matter has been disposed of except for additional requests presented in the present proceedings calling for copies of collective bargaining agreements between the Union and employers in the Indianapolis area and for records of proceedings had thereunder. These requests were denied by the undersigned[3] as similar in content and purpose to requests the denial of which are affirmed by the Board.

Pursuant to notice, a hearing was held at Indianapolis, Indiana, on January 31, 1944, before Charles E. Persons, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by certain of its officials. All parties participated in the hearing. Full opportunity to be heard, to examine, and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the hearing all parties waived their right to participate in oral argument before the Trial Examiner and to present briefs for his consideration.

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3. Through error this ruling does not appear in the transcript of testimony. It is here repeated *nunc pro tunc.*

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact.

I. The business of the respondent.[4]

E. C. Atkins and Company, the respondent, is an Indiana corporation, having its principal offices in Indianapolis where it operates two plants, engaged in the manufacture and sale of saws, tools, and armor plate.

The principal raw materials used in such manufacturing are steel, castings and lumber. During the calendar year 1943 the raw materials purchased cost in excess of $500,000. Approximately 80 percent[5] of such raw materials are purchased and shipped in interstate commerce from points outside the State of Indiana.

In the same period the gross sales of the respondent to the United States Government and to jobbers, dealers, subcontractors and direct to manufacturing consumers, were in excess of $1,000,000. Approximately 80 percent in value of such products were shipped by rail and truck to customers outside the State of Indiana.

During the calendar year 1944, to the date of this hearing, the manufacturing and selling operations of the respondent have continued substantially along the same lines as in 1943.

The respondent advertises through industrial magazines and periodicals.

The respondent concedes that it is engaged in commerce within the meaning of the Act.

II. The organization involved.

Plant Protection Lodge No. 1683 is a labor organization whose membership is confined to plant guards in the Indianapolis area. It is affiliated, through District No. 90,

4. These findings are based on a stipulation of the parties incorporated in the record and on allegations in the complaint admitted by the respondent in its answer.

5. The transcript of testimony incorrectly reported this percentage as "eight." The undersigned hereby orders that the transcript on page 20, line 1 be corrected by substituting eighty for "eight."

with the International Association of Machinists which, in turn, is affiliated with the American Federation of Labor. Local 1683 admits to its membership plant guards employed by the respondent.

III. The unfair labor practices.

A. Background.

The respondent's main plant in Indianapolis covers two entire city blocks and has been in operation since 1857. The Federal Government built and equipped the Fall Creek Ordnance Plant which is operated by the respondent under lease. Since 1937 the United Steel Workers of America, C.I.O. and the respondent have maintained contractual relations covering in general all production workers in both plants but excluding certain craft groups and plant guards. This contract currently provides for a union shop and covers over 1,200 employees. The sawsmiths are a highly skilled group. In the two plants about 60 are employed. They are closely organized in Sawsmiths Local Union No. 18,548 affiliated with the A. F. of L. and have had collective bargaining agreements with the respondent "for a number of years."[6] Their current contract provides for a closed shop.

Plant Protection Lodge No. 1683 was chartered by the International Association of Machinists on April 2, 1943. When a claim to represent a majority of the Plant Protection employees of the respondent, presented by letter dated August 18, 1943, was ignored, the Union on September 14, 1943, petitioned the Board for Investigation and Certification of Representatives. After hearing on September 24, 1943, the Board issued its Decision and Direction of Election on October 19, 1943. An election was duly held on November 17 in the appropriate unit defined by the Board in its decision. The Union received a majority of the votes cast. Accordingly the Board on November 29, 1943, "certified that International Association

6. See Matter of *E. C. Atkins and Company* and *United Steel Workers of America, Local 1543*, C.I.O., 47 N.L.R.B. 479.

of Machinists, District 90 and their affiliate, Local 1683 has been designated * * * as the exclusive representative of all such employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

B. The refusal to bargain collectively with the Union.

1. The appropriate unit and representation by the Union of a majority therein.

The complaint alleges that all plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. This is the appropriate unit found by the Board in its Decision and Direction of Election. The Company does not contest either the combining of the two plants in a single unit or the various inclusions and exclusions in the defined unit.

As noted above an election was held on November 17, 1943, under the Board's supervision. Of 55 valid votes counted, 50 were for and 5 against International Association of Machinists, District 90, and their affiliate Local 1683. No objections to the Regional Director's report on this election was filed by any party.[7] On November 29, 1943, the Board accordingly certified the Union as the statutory representative of the employees in the appropriate unit defined in its Decision. No contention was advanced in the present proceeding attacking the Board's

7. Paragraph 5 of the respondent's answer contains the statement: "the Respondent denies that such secret ballot election was properly conducted." When questioned at the hearing as to the connotation intended, respondent's counsel replied: "There is no connotation intended by that language that the election was conducted other than in a very fair and accurate way and that the ballots were cast as shown by the certificate; that the ballots were counted and that the results were as shown. In other words, on the matter of fairness of the election, there is no contention."

allegation, that the Union is still the representative of the majority of the employees in the appropriate unit. The undersigned finds that the Union is the representative of a majority of the employees in the said unit.

The undersigned finds in accordance with the Board's previous determination of the unit question and its certification of the Union that all plant guards at the respondent's Indianapolis plants, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. It is further found that the International Association of Machinists, District 90, and their affiliate, Local 1683 is and has been at all times since November 29, 1943, the statutory representative of the employees within the appropriate unit.

2. The refusal to bargain.

At some time between December 1 and 20, 1943, the Union sent to the Company by mail a copy of a proposed agreement. Although the document was not accompanied by a covering letter the respondent agrees that its presentation was, in effect, a request for collective bargaining.[8]

Under date of December 20, 1943, the respondent through Cyrus E. Wood, its personnel director, wrote Richardson as business representative of the Union, acknowledging receipt of the proposed agreement, and calling attention to the respondent's contention that auxiliary military police were in no sense employees of the respondent. The final paragraph of this letter read: "Under the circumstances may we suggest that you take such other action as you see fit to establish our obligation to bargain with you respecting such auxiliary military police."

8. Respondent's counsel said: "Quibbling is possible, but I should say that even if the Company has not had much experience with such requests, the attorney for the Company has had, and the attorney for the Company should have advised the Company that it was such a request."

Answering paragraph 8 of the complaint which alleges that "on or about December 14, 1943, and at all times thereafter, the respondent refused, and has since continued to refuse, to bargain collectively with the Union as the exclusive representative of the employees in the unit described," the respondent "admits the facts alleged" in this paragraph of the complaint, "except to the extent of the conclusion inferable therefrom that the "employees" therein described were employees of the respondent within the meaning of that word as used in the [Act]." Near the close of the hearing in the present proceeding respondent's counsel stated "That the respondent will, if it is finally determined that the respondent's contention as to the definition of the word "employee" is incorrect, gladly bargain with the Union in this case."

On all of the above, the undersigned finds that on December 20, 1943, and at all times thereafter, the respondent refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, and that the respondent has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce.

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy.

Having found that the respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The undersigned has found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit. In order to effectuate the policies of the Act, the undersigned will recommend that the respondent, on request, bargain collectively with the Union as the exclusive representative of its employees within the unit herein found to be appropriate.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

Conclusions of law.

1. International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor is a labor organization within the meaning of Section 2 (5) of the Act.
2. All plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, at all times material herein have constituted a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.
3. International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor was on November 29, 1943, and at all times thereafter has been, the exclusive representative of all employees in said unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.
4. By refusing on December 20, 1943, and at all times thereafter to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor as the exclusive representative of its employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

Recommendations.

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the case the undersigned recommends that the respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or other-

wise effect changes in the status of employees, or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout its two Indianapolis, Indiana plants and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to the employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a) and (b) of these recommendations; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the Ninth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondent notifies said Regional Director in writing that he has complied with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C. an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further

provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

Charles E. Persons,
Charles E. Persons,
Trial Examiner.

Dated: February 19, 1944.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683.	Case No. 9-R-1200.

Mr. Kurt F. Pantzer and Mr. Lewis D. Spencer, of Indianapolis, Ind., for the Company.

Mr. F. M. Richardson and Mr. Walter B. Heisel, Jr., of Indianapolis, Ind., for the Union.

Mr. Joseph E. Gubbins, of counsel to the Board.

DECISION
and
DIRECTION OF ELECTION.

Statement of the Case.

Upon petition duly filed by International Association of Machinists, District 90 and their affiliate, Local 1683, herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of employees of E. C. Atkins and Company, Indianapolis, In-

diana, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Thomas E. Shroyer, Trial Examiner. Said hearing was held at Indianapolis, Indiana, on September 24, 1943. The Company and the Union appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Company made a motion to dismiss the petition on the ground that plant-protection employees are not employees within the meaning of the National Labor Relations Act. The Trial Examiner reserved ruling. For reasons appearing below, this motion is denied. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded opportunity to file briefs with the Board. Subsequent to the hearing, the Company requested oral argument before the Board. The request is hereby denied.

Upon the entire record in the case, the Board makes the following:

Findings of Fact.

I. The business of the Company.

E. C. Atkins and Company, an Indiana corporation, is engaged at Indianapolis, Indiana, in the manufacture and sale of saws, tools, and armor plate. The Company operates two plants, both of which are located in Indianapolis Indiana, and both of which are involved in this proceeding. During the year 1942 the Company purchased raw materials valued in excess of $500,000, approximately 80 percent of which was shipped from points outside the State of Indiana. During the same period the Company sold finished products valued in excess of $1,000,000, approximately 80 percent of which was shipped to points outside the State of Indiana. The Company admits that it is engaged in commerce within the meaning of the Act.

II. The organization involved.

International Association of Machinists, District 90 and their affiliate, Local 1683, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.[1]

III. The question concerning representation.

On August 18, 1943, the Union by letter requested recognition as the exclusive bargaining agent for the Company's plant-protection employees. The Company failed to answer the letter. Subsequently, at a conference between the parties, the Company refused to recognize the Union claiming that the unit requested was inappropriate.

A statement prepared by a Field Examiner, introduced in evidence, indicates that the Union represents a substantial number of employees in the unit hereinafter found to be appropriate.[2]

We find that a question affecting commerce has arisen concerning the representation of employees of the Company within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. The appropriate unit.

The Union contends that a unit consisting of all plant guards at the Company's two Indianapolis plants, excluding the chief and lieutenants constitute an appropriate unit. The Company agrees with the scope of the unit but contends that such a unit is not an appropriate one since plant guards, who are all auxiliaries of the military police, are not employees within the meaning of the Act. This contention has been advanced in other cases and has been

1. International Association of Machinists has requested the Board to take judicial notice of its reaffiliation with the A. F. of L.

2. The Field Examiner's statement shows that the Union submitted 51 authorization cards, all of which bear apparently genuine signatures, and 44 of which bear names of persons whose names are listed on the Company's pay roll of September 10, 1943; there are 63 persons within the appropriate unit.

found untenable.[3] More recently, in the *Dravo Corporation*[4] case, the Board fully discussed the question as to whether the militarization of guards alters the character of their employment, stating therein that the relationship of employer and employee still exists despite such militarization. No facts or arguments are presented here which would warrant departing from our prior decisions; accordingly, the Company's contention is rejected.

We find, that all plant guards at the Company's two Indianapolis plants, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. The determination of representatives.

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of our Direction of Election, subject to the limitations and additions set forth therein.

Direction of Election.

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with E. C. Atkins and Company, Indianapolis, Indiana, an election by secret ballot shall be conducted as early as pos-

3. *Matter of Chrysler Corporation, Highland Park Plant*, 44 N. L. R. B. 881; *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973.

4. *Matter of Dravo Corporation*, 52 N. L. R. B., No. 12.

sible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Ninth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of said Rules and Regulations among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any who have since quit or been discharged for cause, to determine whether or not they desire to be represented by International Association of Machinists, District 90 and their affiliate, Local 1683, for the purposes of collective bargaining.

Signed at Washington, D. C., this 19 day of October 1943.

Harry A. Millis,
Chairman,

John M. Houston,
Member,

(Seal)

National Labor Relations Board.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region.

In the Matter of:
E. C. Atkins and Company

and

International Association of Machinists, District 90 and their affiliate, Local 1683.

} Case No. 9-R-1200.

Room 247, Federal Building,
Indianapolis, Indiana,
Friday, September 24, 1943.

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 o'clock p m.

Before:

Thomas E. Shroyer, Trial Examiner.

Appearances:

Mr. Kurt F. Pantzer, 1313 Merchants Bank Building, Indianapolis, Indiana, and

Mr. Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana, for E. C. Atkins and Company.

Mr. F. M. Richardson, 49½ South Delaware Street, Indianapolis, Indiana, and

Mr. Walter B. Heisel, Jr., 49½ South Delaware Street, Indianapolis, Indiana, for the International Association of Machinists.

* * * * *

6 Mr. Pantzer: I have. I wish to say that my motion at this time would be premature, and so I shall renew it at the close of all the evidence. The employer, E. C. Atkins and Company, moves to dismiss the petition for
7 investigation, which is included in Board's Exhibit 1, for the reason that E. C. Atkins and Company is not

and cannot be an employer within the meaning of Section 2, Subsection 2 of the National Labor Relations Act with respect to Auxiliary Military Police who wholly constitute the bargaining unit set forth in Item 4 of the Petition for Investigation, and further, for the reason that the employees referred to in such Petition cannot come within the definition of the word "employees" under the provisions of Section 2, Subsection 3 of the National Labor Relations Act with respect to the alleged employer, E. C. Atkins and Company, they are not in the sense in which the word "employee" is used in the Statute, the relationship of employer and employee with their various interests never having set in and not at this time existing.

* * * * *

8 Trial Examiner Shroyer: With regard to the Interstate Commerce data handed to the Examiner, will you now read that into the record, Mr. Pantzer?

Mr. Pantzer: "E. C. Atkins and Company (hereinafter referred to as the "Employer") is a corporation organized and existing under the laws of the State of Indiana, with two plants in Indianapolis, Indiana. The main plant in Indianapolis, which occupies two entire city blocks and is bounded on the north by South Street, on the west by Capitol Avenue, and on the east by Illinois Street, and on the south by Merrill Street, has been in operation since 1857. The Federal Government owns the new armor plate plant employed by the Employer in war production at the southeast corner of 21st Street and Northwestern Avenue.

"The Employer is engaged in the business of manufacturing and selling saws, tools and armor plate (hereinafter referred to as the 'Business of the Company').

"The facts bearing upon the question of whether the Employer is engaged in interstate commerce, and whether a question of representation affecting commerce arises, in this cause, are as follows:

"1. The principal raw materials used in the Busi-
9 ness of the Employer are steel, castings, and lumber (hereinafter referred to as the 'Raw Materials').

"2. Approximately eighty per cent (80%) of the Raw

Materials used in the Business of the Employer is purchased and shipped in interstate commerce from sources outside the State of Indiana.

"3. Approximately eighty per cent (80%) of the finished products produced by the Employer is sold in interstate commerce to purchasers outside the State of Indiana.

"4. During the calendar year 1942, the Raw Materials used in manufacturing the finished product of the Employer was in excess of $500,000.00.

"5. During the calendar year 1942, the gross sales price of the finished product sold by the Employer was in excess of $1,000,000.00.

"6. The Employer ships its finished products by rail and truck.

"7. The finished product of the Employer is disposed of to the United States Government, jobbers, dealers, subcontractors, and direct to manufacturing consumers.

"8. The Employer advertises through industrial magazines and periodicals.

"9. During the Calendar year 1943 to the date of
10 this hearing, the manufacturing and selling operations of the Employer have continued substantially along the same lines as those related, concerning the year 1942, in the preceding sections hereof.

E. C. Atkins and Company."

• • • • •

17 the Company until we were called before the Board. We were before the Board then and filed a petition for election and the union and the company met before the Board and the certification we have here was made out.

Trial Examiner Shroyer: I take it, Mr. Pantzer, that the Company still declines to recognize and bargain with the union?

Mr. Pantzer: That is correct.

• • • • •

19 WALTER C. GANN, called as a witness by and on behalf of International Association of Machinists, a union, being first duly sworn, was examined and testified as follows:

Trial Examiner Shroyer: Give your name and address to the reporter.

The Witness: Walter C. Gann, 331 South Wolcott street, Indianapolis.

20 *Direct Examination.*

Q. (By Mr. Richardson.) Where are you employed, Mr. Gann?

A. At E. C. Atkins and Company, 402 South Illinois Street.

Q. How long?

A. Since January 21, 1943.

Q. What is your position?

A. My position is as guard member of the Auxiliary Military Police.

Q. Are you acquainted with all the duties of guards?

A. I am.

Q. Do they all wear uniforms?

A. Yes, sir.

Q. They all carry guns?

A. Yes, sir.

Q. Have they been sworn in as Auxiliary Military Police?

A. Yes, I think they all have unless there be one or two new ones that haven't.

Q. That is the general procedure?

A. That is the general procedure—sworn in as soon as possible.

* * * * *

21 Q. Let me ask you a question here, if this is about guards' duties, do you watch the gates or entrances to the plants, and the exits? Do you maintain order, escort visitors, direct traffic, make out passes? Do guards make out passes?

A. No, the guards do not make out passes.

Q. Watch for suspicious circumstances around the plant?

A. That is right.

Q. And fire? You look out for fires, duties and things like that?

A. That's right.

Q. Now carry cash to the different places in the plant?

A. On certain posts we do. Not at all posts.

Q. That, in general, is about what constitutes the duties of the guard, isn't it?

A. That's right.

* * * * *

22 Q. Who hires the guard?

23 A. The personnel manager and the chief.

Trial Examiner Shroyer: What personnel manager?

The Witness: Our personnel manager.

Q. (By Mr. Richardson.) Of the Atkins company?

A. Of E. C. Atkins and Company.

Q. Who pays him?

A. E. C. Atkins and Company, as far as I know.

Q. Are you paid in checks?

A. Paid in checks.

Q. Signed by E. C. Atkins and Company?

A. That is right.

Q. Who has the authority to discharge you?

A. The personnel manager or the chief, I would think, of E. C. Atkins and Company.

Q. Who sets your rate of pay?

A. E. C. Atkins and Company

* * * * *

24 Q. Mr. Gann, at that time you executed an application for membership, is that right?

A. That's right.

Q. And that application was on a printed form which was available at the personnel office of E. C. Atkins and Company?

A. Yes, sir.

Q. How soon after that application was signed were

you assigned to military duty as an Auxiliary Military Police at the Atkins company plant?

A. The following day I went to work on the Auxiliary Police.

Q. You had never worked at the Atkins company place before that assignment?

A. No, sir.

Q. State whether or not it's the custom either before or shortly after the assignment of a new Military Policeman to duty to have him sign a contract with the United States Government, take the oath to defend the Constitution, and be sworn in by an officer of the United States Army?

* * * * *

27 Q. (By Mr. Pantzer.) Mr. Gann, in addition to signing the contract with the United States Government, which is Employer's Exhibit No. 2, you also were sworn in, is that right?

A. That's right.

Q. And in addition to that contract you took a verbal oath of office to support the Constitution of the United States in substance and the Military authorities?

A. Yes, sir.

Q. That oath was almost identical with certain of the language in the contract, is that not so?

A. That's right.

Q. Or do you recall?

A. Yes, that's right.

* * * * *

29 Q. Do I understand that you swore to observe and obey the Articles of War?

A. That's right.

30 Q. Do I understand that you swore to observe and obey the Articles and these Articles are read to you and that you are required to study them?

A. Yes.

Q. Where does that course of instruction take place?

A. We have military school each Monday for a period.

Q. Where is that situated? At the plant?

A. At the Ipalco Club Building. Indianapolis Power

and Light Building. Each Monday for a period of one hour.

Q. Located near the plant?
A. No, not near the plant.
Q. Under military supervision?
A. That is true.
Q. Who conducts the classes and instruction there?
A. An army lieutenant.
Q. Lt. Scanlon?
A. Lt. Scanlon.

* * * * *

33 Q. I now show you a document which is dated June 7, 1943, relating to the subject, The Auxiliary Military Police, and ask you to read paragraph No. 25, the first sentence. Is that the testimony you were at?

A. "A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign, if the plant guard officer or other responsible army representative believes that the efficiency of this plant guard force would be impaired and declines to give his approval thereto."

Q. In other words, your employment on January 21 did not become effective until the Military Police had given their approval to that employment, is that not so?

A. Well, my employment started January 21, al-
34 though I wasn't inducted until August. My employment started on January 21, but I was not inducted until January 27, but my salary started from the date I was employed.

* * * * *

49 HENRY A. JOHNSTON, called as a witness by and on behalf of E. C. Atkins and Company, being first duly sworn, was examined and testified as follows:

Direct Examination.

50 Q. (By Mr. Pantzer.) Give your name and address?

A. Henry A. Johnston, RR1, Box 140, Zionsville, Indiana.

Q. You have stated your name and address for the reporter?

A. Yes, sir.

Q. When did you first take a position as an Auxiliary Military Police stationed at the main plant of E. C. Atkins and Company?

A. Well, sir, I went to work there in such capacity in August, last year, and sworn in shortly after by Lt. John Ritchie, of the United States Army.

Q. Had you ever worked at the Atkins company before?

A. No, sir, no.

Q. Did you, when you obtained your employment at the Atkins company, execute an application of employment?

A. Yes, sir, I filled one of those out, yes, sir.

Q. I show you Employer's Exhibit No. 5, being in blank form and ask you whether that is a copy of the application for employment which you then executed?

A. Yes, sir, that's it.

Q. Where was that application executed by you?

A. In the personnel office of E. C. Atkins and Company.

Q. That is the office where it employs regular employees who are in its production and maintenance work, is that right?

A. That's right, yes, sir.

51 Q. Was any representation made to you at the time you were employed that you would be finally accepted and sworn in to the Auxiliary Military Police?

A. No, sir. In fact, I was given to understand that then when I filled the application that it would not be effective without the approval of the United States Government.

Q. State whether or not to your knowledge that statement is made to all who apply for service as Auxiliary Military police at either of the Atkins plants?

A. Yes, I believe it is; if that is the case, if it is ever overlooked, it is forgotten, but that is the case.

Q. What is your position in the Auxiliary Military Police?

A. I am Chief of the Auxiliary Military Police.

Q. At which plant?

A. South Illinois Street plant.

Q. Main plant?

A. Yes, sir, main plant.

Q. How many lieutenants have you under you?

A. Four.

Q. How many Military Police do the five of you, including your four lieutenants, have under you at the main plant?

A. 32.

Q. Both men and women?

A. No, sir, just men at our plant.

52 Q. But some women are enrolled as Military Police in the ordnance plant?

A. Yes, sir, they are, I believe.

Q. After you signed the application for employment, did you, which is Employer's Exhibit No. 5, you were temporarily assigned to plant patrol work, is that right?

A. Yes, sir.

Q. But were not immediately sworn in?

A. No, sir.

Q. About how soon after you were assigned to work, were you sworn in?

A. It is on the record, could be found out exactly, roughly I would say three weeks.

* * * * *

55 Q. I note that on that certificate the rank has been left blank. What is your rank?

A. I am the Chief, sir.

Q. Is this the commission that was issued to you when you became chief?

A. Yes, sir.

Q. In other words, I note it is dated June 29, 1943, although you originally joined in 1942?

56 A. Yes, sir, that's right.

Q. At that time you were promoted to chief?

A. No, sir, I have been chief all along.

Q. You were hired as chief?

A. Yes.

* * * * *

57 Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Company or the Military?

A. The Military discharges him from the Auxiliary

Military Police. Now there is one thing that should be
58 said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty, he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company.

• • • • •

63 Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?

A. Yes, naturally, I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken
64 an order as such from him.

Q. You try to cooperate?

A. I try to cooperate to the best of my ability and he does the same for me.

• • • • •

70 A. Yes, sir.

Q. With what weapon?

A. With a revolver.

Q. State whether or not the shifts of your guard at your plant rotate or whether they are always the same?

A. The shifts rotate every two weeks.

Q. What do you mean by rotate?

A. I mean that there is entirely—it is my idea, but it seemed a fair way to run it for our particular plant, that they all trade hours every so often and give each other an even break on it, so the 8-4 shift will work from eight until four in the day time for two weeks and then on a Sunday morning, starting at 8 o'clock in the morning, that shift of men will by and large gravitate to the 12-8 shift, upon which they will stay for two weeks, and on completion of that two weeks, they will revert back to the 4-12 shift, that is the idea, although we don't always go to the letter on that.

Q. That is your idea, is it?

A. Yes, sir, that is my idea.

Q. State whether or not the shifts of the regular pro-

duction and maintenance employees at the main plant of the Atkins company rotate?

A. No, sir, they don't rotate at all. They are frozen shifts.

71 Q. What you are doing is directly the opposite of what Mr. Wood in the Personnel Department does with the remaining production employees?

A. Yes, sir.

Q. Will you now kindly tell us a little bit more about the kind of instruction which you and your men under your commband have received from the Military Police and where that instruction was imparted?

A. Once a week on a Monday at the Ipaco on 16th and Alabama Street, we get one hour of instruction at the hands of the United States Army Corps of Military Police. That instruction is taught by a second lieutenant of the Military Police, under the direction of Capt. Wetenhall and his superior, Col. Rasmussen of the Continuous Superior District and subjects taken up are Military Police subjects only and attendant subjects. For instance, we have had a lot of instruction on judo, which is the art of self-defense. We have had instruction on the use of clubs and fists. We have had guiding law of instruction on pistol marksmanship and the general handling and care of them. We have had instruction on military courtesy by training films, methods of arrest by training films, and of disarmament of persons by training films, which are the property of the army and borrowed from the fort at Ft. Harrison in the state here and returned by the

72 lieutenant. They used sighting bars which are the property of Ft. Harrison showing the men how to sight their pieces (hold revolvers) for accuracy, and also there are other subjects such as fire control and prevention. That will give you a general idea. Some of the other subjects I can't recall just now. All Military Police subjects, everyone of them. We have also had close order drill, regular army close order drill on the floor, administered by the lieutenant and his assistants in which we all took part.

Q. What are your hours of work?

A. My own hours?

Q. Yes.

A. I work whenever I think—I work whatever hours I think are advisable to work. They are very scattered and go all around the clock.

Q. You are paid overtime after eight hours in one day?

A. No sir. I work on a straight salary basis. There is no cognizance at all taken of that when there are any extra hours.

Q. Do you on the average work more than eight hours a day?

A. Well—

Q. How much more?

A. Oh, on an average week after week, it might be ten hours—on an average week after week. Sometimes I work as high as sixteen and twenty and twenty-two, de-
73 pending on the day and time and circumstances.

Q. But that is left to your own initiative as a military officer?

A. Yes, sir.

Q. Subject nevertheless to any orders you may get from higher authority?

A. Yes, sir.

Q. Do you recognize any of the officials of the plant as such higher authority? By that, I mean of the company?

A. Not as authority, only that I am hired by the company to afford them protection and that means protection personally as well as protection for the property around them. Naturally they, the officers of the company, are very valuable property. I would regard them as the most valuable property we have to protect, but not as superiors. Anything we guards do—I might explain it in this way—if you look on the bottom of the large letter, you will see at the bottom the motto of the Auxiliary Military Police, "Production must not be interrupted." That is the rule by which we live. Anything that would tend to interrupt production, whether it would be tampering with machinery or personnel or anything else.

* * * * *

76 Q. Are you paid by check?

A. Yes, sir.

Q. Who signs the check?

A. E. C. Atkins and Company.

Q. What do you mean you are hired by the Government when E. C. Atkins and Company pays you?

A. They pay because the Government makes them pay me.

Q. Have you got any commission in the army?

A. No, not with the Government.

Mr. Richardson: That's all.

• • • • •

77 Q. Who made you the Chief?

A. I don't know. I was hired just like a regular guard with the idea that I would be Chief and after a certain length of time, I became Chief at the Okey of the army and the company.

• • • • •

81 CYRUS E. WOOD, called as a witness by and on behalf of E. C. Atkins and Company, being first duly sworn, was examined and testified as follows:

Trial Examiner Shroyer: Give your name and address to the reporter.

A. Cyrus E. Wood, 634 West Maple Road, Indianapolis, Indiana.

Direct Examination.

Q. (By Mr. Pantzer.) State, Mr. Wood, what your relation is to E. C. Atkins and Company, the employer in this case.

A. Personnel Director for the various plants of E. C. Atkins.

Q. How long have you been employed by the Atkins company?

A. 37 years this fall.

Q. How long have you been Personnel Director?

A. Seven years, actual. Previous to that time, about five years, I was known as Force Director, which eventually developed to the personnel work.

• • • • •

83 Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

A. Thirty-two.

Q. When you say your employees, they are your employees only in the sense that you pay their wages, is that right?

A. That is correct.

Q. And you make the necessary pay roll deductions?

A. That's right.

• • • • •

88 Q. (By Mr. Pantzer.) Your relationships with the Saw Smiths' Union so far as it has been reduced to writing, is evidenced by these three documents, No. 18, 19, and 20?

A. That is correct.

Q. Before the Atkins company became engaged in defense work, will you kindly state how many watchmen were employed as employees by the Atkins company?

A. It varied from four to six. We had two night watchmen on patrol called clock men—made the rounds regularly through the plant and pulled the 82 boxes. The night clocks.

Q. You had four day men?

A. No, two day men at the gates. Frankly, they were, at that time that was a pensioner's job.

Q. You now have a total of Auxiliary Military Police of how many at both plants?

A. Sixty-four.

Q. This increase in the staff required to guard and protect the plant has been occasioned by the participation of the Atkins company in the war effort and the insistence of the Military that the plant be adequately protected against sabotage and similar happenings, is that right?

A. At the beginning of our participation in the
89 production of war materials; namely, armor plate, representatives from the Cincinnati office came into our plant and made a survey and gave us a recommendation of the requirements of the Government in so far as plant production would be considered and that was submitted in writing and complied with.

Q. When you say the Cincinnati office, you mean the Cincinnati Ordnance Office?

A. Ordnance Office.

Q. Are most of your contracts with the Ordnance Department?

A. We have had dealings in the past and have complied with the recommendations of both the army and navy. The major part of our control was of the army and at this time is practically all controlled by army interests.

Q. Was it the Ordnance Department that insisted upon your switching over from a watchman basis to an Auxiliary Military Police basis or was it the Military Police?

A. It was the army representatives from the Ordnance Department of Cincinnati, out of Col. Rasmussen's office that required it.

Q. As a result of that insistence the Auxiliary Military Police were employed?

A. That is correct.

Q. State whether or not, Mr. Witness, the Atkins company could retain any of its war contracts if it did not submit to the system of Auxiliary Military Police that
90 is now in force at the plants?

A. It is understood and the majority of contracts submitted, you will find the clause stating that unless proper protection of Government property is provided in compliance with certain directives, that will be issued from time to time, some of these special contracts will be or might be cancelled and fact of the matter is would be if we did not comply with the interests.

Q. You have heard the testimony of Chief Johnston on the stand with respect to the right of E. C. Atkins and Company to hire or discharge Military Police, is that right?

A. That's right.

Q. Is his testimony with respect to that correct?

A. It is correct.

Q. Is his testimony with respect to your being permitted to make recommendations but not being permitted to give orders respecting the duties of the Auxiliary Military Police correct?

A. It is correct.

Q. You have been able to work in cooperation with the Auxiliary Military Police?

A. We have, yes.

Q. Have you ever attempted to exercise any of the

authority which you are prohibited from exercising
91 by military orders over any of these sixty-four members of the Military Police?

A. Not to my knowledge.

Q. Or has any foreman or hiring officer or director of Atkins and Company attempted to exercise such a right?

A. No.

Q. Instructions have been promulgated, have they not, throughout the entire plant that the Military Police are the business and affairs of the military authorities?

A. That's correct. It is understood, sir.

* * * * *

94 Q. Do the Auxiliary Military Police wear such identification badges?

A. They do not.

Q. When a person applies for employment as an Auxiliary Military Policeman, where does he fill out the application from which Employer's Exhibit No. 5 is taken? Is that done in your office?

A. Yes, sir.

Q. Your office both in the main plant and the Fall Creek plant?

A. Yes.

Q. Do you have the authority to accept that application for the military authorities?

A. I can accept that only subject to the approval or
95 disapproval of the Cincinnati office. We select or rather we interview and select prospective guards. Those men are in turn, their names are submitted to the Cincinnati office along with the proper papers that are provided by the Government for them to fill out. By their approval they are permanently inducted into the Military Police group, or upon their rejection, they would be given their dismissal papers.

Q. When you say you select them, as a matter of fact, all you do is just to recommend the man to them?

A. I interview, but recommend them.

* * * * *

96 Trial Examiner Shroyer: Any further questions?
Mr. Richardson: Yes.

Cross-Examination.

Q. (By Mr. Richardson.) Mr. Wood, when employers on the guard force are hired, who sets the rate of pay?

A. The rate of pay was established when we filed
97 our schedule October 3, 1942, with the Wage and Hour Division.

Q. The company set that rate of pay at that time?

A. That's right.

* * * * *

RESPONDENT'S EXHIBIT NO. 2.

Agreement Between the United States of America and Plant Guard

In order that the existing military forces of the United States may be most effectively employed in combat activity against the enemies of the United States, the United States is approving the employment of certain guards as civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers for violation of Federal laws, as well as for violations of orders and regulations issued by military authority. The United States require that only persons physically fit, well trained in the use of arms and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

Now, therefore, I, ..., who have been or am about to be employed by ..... as a guard at ..... for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

(2) I will bear true faith and allegiance to the Constitution of the United States;

(3) I will well and faithfully discharge my duty as a cilivian auxiliary to the military police to protect war material, was premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers;

(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

_____

Signature

_____

Witness

_____

Date

UNITED STATES OF AMERICA
AUXILIARY MILITARY POLICE
ARMY OF THE UNITED STATES
PLANT GUARD IDENTIFICATION CARD

This is to Certify that Henry A. Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States at E.C.Atkins & Co., Indianapolis, Ind. and is subject to Military Law for the duration of the War or until official termination by the War Department of his services as an [illegible].

For the Commanding General, [illegible]

Date 8-3-43

Serial No. 126-ATE-016

B. R. WETENHALL
Capt. C. M. P.
District Plant Guard Officer
Cert. Serv. Dist. Off. Cincinnati, O.

Property of War Department:—To Be Returned to This Office Upon [illegible]

Information on Reverse Is Certified as Correct: Signature of Issuing Official

Signature of Person to Whom Issued

BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	COMPLEX	SEX
5-26-06	5'10½"	155	Blu	Brn	Fai	M

SCARS OR MARKS Rgt. Elbow, skin
Lft. Caulifl. ear
wears glasses

Fingerprinted 8-24-42
U. S. Citizen by: Birth
ONLY FOR IDENTIFICATION
NOT A PASS

Henry A. Johnston

RIGHT THUMB PRINT

LEFT HAND PRINT

NATIONAL LABOR RELATIONS BOARD
CASE NO. R-1200 { BOARD / RESPONDENT } EXHIBIT NO. 3
IN THE MATTER OF E.C. Atkins & Co.
DATE 7-2-43 WITNESS [illegible]
ETHEL F. FISHER, Official Reporter
BY Aurora Hand

3/8

RESPONDENT'S EXHIBIT NO. 4.

War Department
CONTINUOUS SECURITY DISTRICT OFFICE
904 Enquirer Building
Cincinnati, Ohio

ACR/hc

To Insure Prompt Attention
In Replying Refer To
PPDB No. Sect. V-1
Plant Guard Section

Plant Protection Data Binder
Section V, Letter 1
Dated June 7, 1943

Subject: The Auxiliary Military Police

1. Executive Order No. 8972, dated December 12, 1941 authorizes the Secretary of War and the Secretary of the Navy, "to establish and maintain military guards and patrols, and to take other appropriate measures to protect from injury and destruction", certain strategic premises, materials, and utilities. In accordance therewith the Secretary of War directed the military organization of plant guard forces as Auxiliary Military Police.

2. These guard forces will be organized as a civilian Auxiliary to the Military Police in all plants producing war material important in the war effort.

3. At the time any guard force is organized, the Commanding Officer having jurisdiction over the force will:

a. Cause the Articles of War to be read and explained to each member of the guard force (see para. 18);

b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises and war utilities which the force is assigned to guard;

d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to military law as long as he remains a member of the guard force. (A copy of the Guard Agreement is attached, CIPP 124.)

Production Must Not Be Interrupted

CIPP 139-1

4. The purpose of organizing the plant guard force is to increase the authority, efficiency, and responsibility of the guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in war time emergency situations.

5. Nothing in this letter will be construed as modifying the responsibility of the plant managements for providing adequate protection at all times against all hazards. The District Plant Guard Officer may, however, take appropriate action through the plant management to correct any condition deemed by him to result in or threaten defective or inadequate performance by the guard force of its ordinary protective duties.

6. The mission of a guard force of Auxiliary Military Police is:

a. To provide interior and exterior protection of the plant against sabotage and espionage and natural hazards.

b. To serve with the Army in providing the protection to the plant and its environs in emergency situations.

7. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; protection from air raid; Fifth Column activity; paratroop attack or invasion; or it may arise from any other condition or circumstances involving the plant or its community.

8. A guard force, or any member thereof, whether on or off duty, may be assigned to duty in an emergency at

places other than the premises of the plant normally served, provided only that in the opinion of the District Plant Guard Officer or other representative of the Army in command such assignment will contribute to the protection of the guard force's own plant and its environs or to the protection of its production.

9. In addition to the regular plant guards other groups of employees may be inducted as members of the Auxiliary Military Police. The District Plant Guard Officer will determine which groups are eligible.

10. Persons such as firemen, watchmen, and women guards may be included, provided they are able physically

to perform the duties and missions of the Auxiliary Military Police described herein and in the agreement signed by the guards.

11. Women guards may be armed, but in view of the Congressional policy that women auxiliary forces be limited to non-combatant duty, it is recommended that in forming plans for any emergency situations requiring the use of force against the enemy such plans will provide for assignment of women Auxiliary Military Police to non-combatant activities.

12. No minimum number of guards is required for the militarization of any guard force. Guard forces, no matter how small, will be militarized if the plants which they guard are so located that the guards can be organized, trained and commanded efficiently by available Army personnel, and if in the opinion of the District Plant Guard Officer, the results obtainable are commensurate with the effort involved.

13. Employment of an alien as a plant guard must be approved by the Secretary of War in the same manner as employment of an alien having access to work on classified or aeronautical contracts.

14. The Provost Marshal General is charged with the general supervision of the activities relating to the Auxiliary Military Police as a part of the Internal Security pro-

gram. The commanding generals of the Service Commands are responsible for the military organization, training, and command of the guard forces at the plants and installations within their respective Service Commands and under their jurisdiction.

15. The Commanding General of the Fifth Service Command has designated the Chiefs of the Continuous Security Districts as the Commanding Officers in their various districts. They are also the "Commanding Officer having jurisdiction over the plant guard forces" of plants and installations at which there is no local resident commanding officer. They then appoint District Plant Guard Officers, who are in direct charge of plant guard forces of such plants in their districts. For each plant or group of plants at which there is no local resident Commanding Officer, a Plant Guard Officer will be designated by the District Plant Guard Officer. The Plant Guard Officer is the member of the Army of the United States in command of the guard force and will report direct to the District Plant Guard Officer.

CIPP 139-3

16. At each plant where there is a local resident Commanding Officer, this officer will be the Commanding Officer having jurisdiction over the guard force. He may serve as the Plant Guard Officer himself or cause another officer to be appointed as such.

17. If a plant at which the guard has been organized as Auxiliary Military Police is removed from the Service Command Responsibility List, the Commanding General of the Service Command will determine whether such guard force will be continued as Auxiliary Military Police and trained and commanded as before, or whether its status as such will be terminated.

18. Guard forces which are to be organized will be assembled at the earliest practicable date by the plant management at the request of the plant guard officer. At this assembly the Articles of War will be read and explained to each member of the guard force by the plant guard officer or, in his absence or unavailability, by some other com-

petent person who is an officer of the Army or civilian officer of the Auxiliary Military Police. As certain of the Articles of War are generally inapplicable to the Auxiliary Military Police, the foregoing directive will be considered complied with if articles 2, 58, 61-64, 66, 68-74, 76, 81-83, 85, 88-90, 92-94, 96, 104, 105 are read and explained. These articles define certain offenses punishable by court martial of which persons subject to military law may be guilty.

19. The Auxiliary Military Police, immediately after the Articles of War have been read and explained, will be impressed with the fact that the Government of the United States is interested in the security of the plant and its production, as essential to the successful prosecution of the war. To this end the plant guard officer will issue and post a guard order. Guard Order No. 1 will be posted at your plant. A copy of same is attached hereto. At the time of reading the Articles of War, each member of the guard force gives the pledge of loyalty to the United States and executes the plant guard agreement.

20. If a guard refuses to sign the agreement he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as he is replaced, and in any event within a reasonable time. The signed agreement will be retained by the District Plant Guard Officer. The guard force will be considered as a civilian auxiliary to the military police when 75 per cent of the guards at a given plant have signed the agreement. A certificate of membership in the Auxiliary Military Police will be issued to each member. Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released by the War Department from his obligations. This will take place when competent military authority has approved of his dismissal or resignation or when he has been discharged without honor.

CIPP 139-4

21. Orders and regulations for the Auxiliary Military Police will be issued in the name of the Commanding Officer having jurisdiction over the guard forces. The Chief of

the Continuous Security District is the Commanding Officer of the plant guard forces in the District. At civilian operated plants such orders will be issued after plant management has indicated its concurrence by signing the guard order in the lower left hand corner.

22. The Auxiliary Military Police will continue to function as formerly; that is, as when they were employed by the plant only and were not also under the direction of the Army. However, a member of the Army of the United States will be in command at all times. He will be in command for purposes of instruction and drilling and, in particular, to take over the command of the force if and when an emergency justifying such action occurs. Although the plant guard officers will be in command at all times they will not supplant the civilian guard officers, and unless expediency demands otherwise, the plant guard officers will exercise their authority through the guard officers established by the plant management.

23. The Auxiliary Military Police are supplementing the Army of the United States in a vital task of protecting war material an war production facilities. Attempts to intimidate them or reduce or nullify their efficiency and interfere with the performance of their mission may constitute a violation of Federal as well as state criminal laws. Any and all such incidents are to be reported by the guard members to their chiefs and a detailed report will be made to the District Plant Guard Officer relative to each such incident.

24. Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25. All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private employer may as heretofore, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary.

25. A member of the Auxiliary Military Police may not

be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant

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management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guards enrollment as a member of the Auxiliary Military Police. This will usually be done on the management's recommendation unless an emergency requires the guard's retention.

26. A Certificate of Meritorious Conduct will be issued to each member of the Auxiliary Military Police whose services are terminated honorably. In the event of termination of services under conditions other than honorable no such Certificate will be issued. A communication may be addressed to the individual whose services have thus been terminated stating only the fact of termination and that the communication is not a Certificate of Meritorious Conduct.

27. The status of the employer in regard to the employee benefits for the guard force is not changed. For example, Social Security, Workmen's Compensation, Employer's Liability and vacation schedules remain unaffected. Employers should have a clear understanding with their insurance companies concerned.

28. A member of the Auxiliary Police must be physically fit to perform his duties properly and in an efficient manner. It is sufficient if his physical fitness satisfies the plant guard officer.

29. Each member of the Auxiliary Military Police will be properly uniformed by the plant. A complete uniform consisting of blouse, or shirt, trousers and hat is not required, although the complete uniform is preferred. Obviously the uniform adopted by the plant must be worn by all members of the plant guard force.

30. Because the mission of the Auxiliary Military Police

includes service in the Army, the laws of war require that the members wear distinctive insignia or marks capable of recognition at a distance. By wearing such insignia or marks, members, serving with the Army, will be recognized as legitimate troops and not deemed irregulars or guerillas. Accordingly, members of the Auxiliary Military Police in the Fifth Service Command will wear the insignia as outlined in Plant Protection Data Binder Letter Section V—letter 3.

31. Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six months of service faithfully performed. Service stripes will be in accordance with Army Regulations. A Plant Protection Data Binder letter will be issued shortly completely describing service stripes.

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32. Members of the Auxiliary Military Police, who are entitled thereto in their own right may wear, when in their plant guard uniform such decorations, service medals, ribbons and badges as are authorized for wear on the United States Army service uniform.

33. For plants that have established proper plant protection proficiency and where the guard force is of adequate size, properly drilled, properly uniformed and meeting certain minimum requirements, a distinctive guidon for the Auxiliary Military Police Force at that plant will be authorized.

34. Each member of the Auxiliary Military Police must carry at all times a proper identification card completed and issued by this office. This identification card is described in Plant Protection Data Binder Letter Section V—6.

35. The Auxiliary Military Police must be armed with appropriate weapons furnished by the plant management. Training in the use of firearms and providing the ammunition, therefore, are functions of plant managements. Instruction in the use of firearms is being given by the plant guard officers as a part of the plant guard training program now being conducted.

36. The Auxiliary Military Police are agents of the Federal Government and will not be subject to any state or municipal requirement which conflicts with their war time duties. Plant Guards should not be permitted to wear or carry firearms away from the plant property, excepting when the fulfillment of their duties requires it. Also, an exception is the wearing of side arms by the plant guards to plant guard training schools or to pistol ranges where they are practicing firing revolvers.

37. In general, there will be no considerable additional advantage in deputizing the members of the Auxiliary Military Police as special policemen, sheriffs, or marshals. There will be individual cases, however, in which it will be advisable to continue the local or state official capacity. The authority of the plant guard includes power to arrest without a warrant for violation of the Sabotage Act (50, USC, 101-106) or the Espionage Act (50, USC, 21-32). The plant management continues to be charged with the training of its guard forces in their ordinary protective duties. In addition, the guard force must be qualified to perform its duties as set forth in paragraph 6. This includes the ability

to serve efficiently with the Army in any emergency situation which may arise (see paragraph 7). To this end, the Auxiliary Military Police will be trained by, or under the direction of the plant guard officer in military subjects in accordance with requirements established by the District Plant Guard Officer. The time to be devoted to such training will be determined by the plant guard officer. It will not exceed one hour per week or its equivalent except with the approval of the plant management.

38. When a member of the Auxiliary Military Police injures or kills a person while in the performance of his duties, he will be arrested and detained by the Plant Guard Officer. If a civil police official seeks to arrest him, the plant guard officer, under the authority of the 74th Article of War, may refuse to release the individual until such release is approved by the Commanding General of the Service Command. A member of the Auxiliary Military Police

is entitled to the same protection as a sentinel under similar circumstances.

39. Members of the Auxiliary Military Police are eligible for the decoration "Medal of Merit" authorized by the President for award to civilians who distinguish themselves by especially meritorious conduct or by performance of outstanding services. All cases of members of the Auxiliary Military Police, who in the opinion of the District Plant Guard Officer deserve consideration for this award will be referred through channels to the Office of the Provost Marshal General for transmission to the "Medal of Merit" Board. A full statement of facts and appropriate recommendations should be included.

40. Any case of meritorious conduct, which in the opinion of the District Plant Guard Officer does not warrant recommendation for the award of the "Medal of Merit", but which he deems deserving of official commendation will be the subject of a special order of commendation issued by the Commanding Officer having jurisdiction over the guard force. Such special orders will be issued promptly and with liberality and will be given appropriate publicity, particularly among the guard force concerned. A copy of such special order will be furnished to the employer.

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41. Any questions concerning information given in the foregoing should be addressed directly to this office.

Yours very truly,

A. C. Rasmussen,
Lt. Col., Ord. Dept., District Chief.

Incls: 2
CIPP 124—Guard Agreement
CIPP 68—Guard Order #1

CIPP 139-9

RESPONDENT'S EXHIBIT NO. 5.

We Are Permitted to Employ Only Citizens of the United States

Application for Employment
E. C. Atkins and Company
Indianapolis, Indiana

Please Print Draft Classification.....

Date ..... Social Security No. .....

Name (Last Name)..... (First Name).....
(Middle Name)..... Sex..... Race.....

Address (Number and Street)..... (City)
..... (State).....

Phone.....

Age..... Height: Ft..... In..... Weight..... No. of Children..... Ages..... No. of Other Dependents .....

Relatives in Company: (Yes or No.)..... Names and Relationship .....

Are You a Former Employee? (Yes or No)..... Date Last Employed by This Company..... Why Did You Leave? .....

Check One: Married Single Widow(er) Divorced Separated

Citizen of the United States (Yes or No)..... Place of Birth ..... Date of Birth.....

If Foreign Born, State: (Port of Entry).....
Date of Entry..... Date First Papers.....
Date Last Papers.....

Place of Issuance Naturalization.....
How Long in U. S.? (Years)..... How Long in City? (Years).....

Father's Name..... Place of Birth.....
Citizen of U. S. (Yes or No).....

Mother's Maiden Name..... Place of Birth
..... Citizen of U. S. (Yes or No.).....

United States Military Service (Yes or No).....
Branch..... How Discharged..... Date
.....

Are You Now a Member of any Military or Naval Unit?
(Yes or No)..... Have You Been to a Foreign
Country in the Past 15 Years? (Yes or No).....

Education and Special Training:

Grade School (Years)..... High School (Years)
..... College (Years)..... Technical,
Trade or Business (Years).....

High School (Name and Location).....
Course of Study.....

College (Name and Location)..... Subject
Majored in .....

Do You Write or Speak Any Foreign Language?.....
If So Which Language.....

What Is Your Hobby?..... Do You Read
Blue Prints?..... How Well?.....

(For Married Applicants Only)

Husband's Name or / Wife's Maiden Name } (Strike Out One—If Married)
..... Birthplace (Husband or Wife)
.....

Husband's / or Wife's } Occupation (Strike Out One—If Married)
..... In An Emergency Notify
.....

Mark Number of Months Worked on any of the Following:

Office

__ Addressograph Machine
__ Bookkeeping, General Ledger
__ Bookkeeping, Machine
__ Clerk, Accounts Payable
__ Clerk, General File
__ Clerk, Mail
__ Clerk, Statistical
__ Comptometer
__ Purchasing
__ Secretarial
__ Tabulating Machine
__ Timekeeper
__ Typist Stenographer
__ Cost Accounting

Experience Not Listed Above

____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____

____ Welding, Arc Steel
____ Welding, Aluminum
____ Sheet Metal, Bench
____ Brake, Metal
____ Bending and Rolling Machine
____ Shear, Foot
____ Cable Splicing
____ Exp. Assembly
____ Instrument Installation

Maintenance

____ Blacksmith
____ Carpenter
____ Electrician
____ Janitor
____ Laborer
____ Millwright
____ Pipefitter
____ Welding

Engineering Experience

____ _____
____ _____
____ _____
____ _____

Drafting

____ Layout
____ Detailing
____ Checker

..... Tool Design
..... Tool Routing
..... Blue Print Machine

Machine Shop

..... Milling Machine
..... Mill, Horizontal Boring
..... Mill, Thread
..... Profiler
..... Broach
..... Lathe, Engine
..... Lathe, Bench
..... Lathe, Automatic
..... Lathe, Turret
..... Jig Borer
..... Drill Press
..... Drill Press, Multiple Spindle
..... Radial Drill
..... Casting Layout
..... Screw Machine, Hand
..... Screw Machine, Automatic
..... Gear Shaper
..... Gear Cutter
..... Grinder, Internal
..... Grinder, Cylinder Internal
..... Grinder, External
..... Grinder, Gear
..... Grinder, Surface
..... Grinder, Centerless
..... Grinder, Tool
..... Grinder, Drill
..... Grinder, Cutter
..... Buffing and Polishing
..... Machinist, Bench
..... Machinist, All Around
..... Die Making
..... Jig Building
..... Tool Making
..... Template Making
..... Punch Press

Miscellaneous

..... Electro Plating
..... Heat Treating
..... Inspection, Receiving
..... Inspection, Floor
..... Inspection, Final
..... Inspection, Assembly
..... Inspection, Tool and Gauge
..... Pattern Making, Wood
..... Pattern Making, Metal
..... Sand Blasting
..... Shipping and Receiving
..... Bearing Casting

Executive Experience

State Nature

....
....
....

Have You a Complete Set of Tools? Yes..... No.....
If Not, What Tools Have You?.....

List All Past Employment, etc.: Last Employment in Space No. 1. Include Periods of Unemployment.

Name of Past Employers and Addresses	Dates of Employment From Mo. Yr.	To Mo. Yr.	Job Classification or Duties	Salary or Wages	Reason for Leaving
(1)					
(2)					
(3)					
(4)					
(5)					
(6)					

List Three References Not Relatives or Employees of This Company

Name..... Address.....
Occupation.....

Name..... Address.....
Occupation.....

Name..... Address.....
Occupation.....

For What Kind of Work Are You Applying?.....
Second Choice.....

Have You Any Physical Disability? (Yes or No).....
If So, State Condition.....

1 BEFORE THE NATIONAL LABOR RELATIONS BOARD.

Ninth Region.

In the Matter of: E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

Room Number 216
Federal Building
Indianapolis, Indiana
Monday, January 31, 1944

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a. m., c. w. t.

Before:

Charles E. Persons, Trial Examiner.

Appearances:

Messrs. Thomas E. Shroyer, and
Allen Sinsheimer, Jr., for the National Labor Relations Board, 443 U. S. P. O. and Court House, Cincinnati, Ohio.

Messrs. Kurt F. Pantzer, and
Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana,
Appearing on behalf of the Respondent.

Messrs. F. M. Richardson, Business Agent,
Carl Cedarquist, Grand Lodge Representative,
William J. Layton, Business Agent, 49½
2 South Delaware Street, Indianapolis, Indiana; and

Mr. Van B. Carter, Business Agent, International Association of Machinists, Broadway Hotel, Cincinnati, Ohio,
All appearing on behalf of the International Association of Machinists, District Number 90, and their affiliate Local Lodge 1683.

15 It is hereby stipulated and agreed as follows:

That the entire record in the matter of E. C. Atkins and Company, and International Association of Machinists, District 90, and their affiliate Local 1693, Case number 9-R-1200, be incorporated herein by reference and considered as if a part hereof specifically involving thereby, but not in any way limiting generally in the foregoing:

(1) All exhibits therein:

(2) The entire official report of the proceedings of the hearing of that case on September 24, 1943:

(3) Brief of E. C. Atkins and Company filed therein:

(4) Decision and Direction of Election of the National Labor Relations Board in said matter dated October 19, 1943:

(5) Petition of E. C. Atkins and Company dated October 28, 1943 asking reconsideration of the said Decision and Direction of Election of October 19, 1943:

(6) Order Denying Petition dated November 2, 1943:

16 (7) Report of Acting Regional Director on Order of Election, dated November 18, 1943:

(8) Affidavit as to Service thereof:

(9) Certification of Representatives dated November 29, 1943:

Now, is that statement agreed to, Mr. Pantzer?

Mr. Pantzer: Yes, I so stipulate.

Mr. Sinsheimer: Does the Union stipulate to that statement?

Mr. Richardson: Yes, we so stipulate.

* * * * *

18 Mr. Sinsheimer: Mr. Pantzer has just handed me a statement concerning commerce which I am accepting and reading into the record. That statement reads: (Reading)

E. C. Atkins data as to commerce:

19 It is dated January 31, 1944:

(Reading from document) E. C. Atkins and Company parenthesis herein referred to as the, quote, "Employer" end parenthesis, is a corporation organized and existing under the laws of the State of Indiana with two

plants in Indianapolis, Indiana. The main plant in Indianapolis, which occupies two entire city blocks and is bounded on the north by South Street, on the west by Capitol Avenue, on the east by Illinois Street, and on the south by Merrill Street, has been in operation since 1857. The Federal Government owns the new armor plate plant employed by the Employer in war production at the southeast corner of 21st Street and Northwestern Avenue.

The Employer is engaged in the business of manufacturing and selling saws, tools and armor plate, parenthesis, (hereinafter referred to as the "Business of the Employer") end quote, and parenthesis.

The facts bearing upon the question of whether the Employer is engaged in interstate commerce, and whether a question of representation affecting commerce arises, in this cause, are as follows:

1. The principal raw materials used in the Business of the Employer are steel, castings, and lumber, parenthesis, (hereinafter referred to as the "Raw Materials") end quote, end parenthesis.

2. Approximately eighty per cent of the raw materials used in the Business of the Employer is purchased and shipped in interstate commerce from sources outside the State of Indiana.

3. Approximately eighty per cent of the finished products produced by the Employer is sold in interstate commerce to purchasers outside the State of Indiana.

4. During the calendar year 1943, the Raw Materials used in manufacturing the finished product of the Employer cost in excess of five hundred thousand dollars.

5. During the calendar year 1943, the gross sales price of the finished product sold by the Employer was in excess of one million dollars.

6. The Employer ships its finished products by rail and truck.

7. The finished product of the Employer is disposed of to the United States Government, jobbers, dealers, subcontractors, and direct to manufacturing consumers.

8. The Employer advertises through industrial magazines and periodicals.

9. During the calendar year 1944, to the date of this hearing, the manufacturing and selling operations of the Employer have continued substantially along the same lines as those related, concerning the year 1943, in the preceding sections hereof.

21 E. C. Atkins and Company.

Trial Examiner Persons: Is this stipulated by all the parties that that statement is correct in all detail?

Mr. Pantzer: We so stipulate, sir.

Mr. Sinsheimer: The Board so stipulates.

Mr. Richardson: We so stipulate.

• • • • •

22 Mr. Richardson: Yes.

Trial Examiner Persons: And the Board so stipulates?

Mr. Sinsheimer: Yes, the Board so stipulates.

Mr. Pantzer: With the Board's permission and the Examiner's, I should like to interpolate a further stipulation, namely, that the parties hereto agree that all the other witnesses who testified at the hearing of September 24, 1943, would, if they took the stand in this hearing today, testify exactly as they did on September 24, 1943, with the exception of the natural allowances in their testimony which would have to be made as to time, because of the intervening period from September 24, 1943 to January 31, 1944.

Mr. Sinsheimer: The Board agrees to that.

Mr. Richardson: Yes, we agree to that also.

Mr. Pantzer: We so stipulate also.

Now, that stipulation includes not merely the witnesses of the Respondents, but all of the other witnesses of the Board, is that right? There were other witnesses for the Board, I think.

• • • • •

34 Mr. Sinsheimer: At this time I would like to call to
35 the Trial Examiner's attention that in Paragraph 7 of Respondent's Answer, the Respondent insists that the Union has requested bargaining rights, and in Paragraph 8 the Respondent admits that the Company has refused to bargain with the Union. I believe Mr. Pantzer desires to make a statement as to that—

Mr. Pantzer: I merely desire to call the Trial Examiner's attention to the two qualifications I set forth in the Answer to those two admissions which are dependent, of course, upon the definition of the word "employees".

Trial Examiner Persons: I think it might be helpful to the record if you would tell us how the Company received that proposed agreement, whether there were any definite demands or requests for changes in the document itself?

Mr. Pantzer: I cannot state how the Respondent received the proposed agreement prior to December 20, from my own knowledge, but I state, subject to correction by Mr. Richardson over at the Union's table there, that it was received in an envelope through the United States mail, addressed to E. C. Atkins and Company, Indianapolis, Indiana, without any forwarding letter.

Mr. Richardson: That's right.

Trial Examiner Persons: Will the Respondent agree that that was, in effect, a request for collective bargaining?

Mr. Pantzer: Yes. I do not wish to quibble with
36 the Trial Examiner. Quibbling is possible, but I should say that even if the Company has not had much experience with such requests, the attorney for the Company has had and the attorney for the Company should have advised the Company that it was such a request.

Trial Examiner Persons: Thank you, sir.

Mr. Sinsheimer: The Board rests.

Trial Examiner Persons: Do you have matters to present, Mr. Pantzer?

Mr. Pantzer: I have no testimony or exhibits to submit in answer to the Board's case, but wish to be permitted this statement:

That the Respondent will, if it is finally determined that the Respondent's contention as to the definition of the word "employees" is incorrect, gladly bargain with the Union in this case and that the Respondent, as an employer, has no animosity whatever toward Mr. Richardson, who has been the organizer of the Union and who has behaved himself and counseled members of the Union to behave themselves, with exemplary conduct in this case.

• • • • •

37 Trial Examiner Persons: There is one little matter that I read in the Answer, Mr. Pantzer, upon which I would be glad to have your definition, in Paragraph 5 on page 2, wherein you speak about the Board's election and wherein you state ". . . but the Respondent denies that such secret ballot election was properly conducted—" and etcetera, and my question is about your phrase "denies—such—election was properly conducted—" and my question is: What connotation is intended by that, sir?

Mr. Pantzer: There is no connotation intended by that language that the election was conducted other than in a very fair and accurate way and that the ballots were cast as shown by the certificate; that the ballots were counted and that the results were as shown.

In other words, on the matter of the fairness of the election, there is no contention.

The only contest is that it was not a proper election in the light of the fact that the plant guards who voted in that election were not employees of the Respondent within the meaning of the word "employees" as defined in the National Labor Relations Act and that consequently the election was improper in that the Board had absolutely no jurisdiction in the premises.

Trial Examiner Persons: But there is no contest as to the conduct of the election itself?

38 Mr. Pantzer: None whatever.

BOARD EXHIBIT NO. 102.

An Agreement Between the
E. C. Atkins Company
Indianapolis, Indiana
and the
International Association of Machinists, District No. 90 and Its Affiliated Local Lodge No. 1683.

Preamble

E. C. Atkins Company and the International Association of Machinists, District No. 90, and its affiliated Local Lodge No. 1683, desiring to promote and improve relationship be-

tween the parties, and to establish basic understanding as to hours of work, conditions of employment, rates of pay and to provide a fair and equitable method of handling and adjusting grievances, have negotiated and do hereby agree to the following Articles of Agreement at Indianapolis, Indiana, on this ..... day of ....., 1943.

Article I—Recognition.

Section 1. Recognition. E. C. Atkins Company, hereinafter called the Company does hereby recognize the International Association of Machinists, District No. 90, and its affiliated Plant Protection Local Lodge No. 1683, hereinafter called the Union, as the exclusive bargaining agent within the meaning of the National Labor Relations Act, for its employees in the unit described in Section 2 of this Article.

Section 2. Unit. The National Labor Relations Board has certified and the Company and the Union do hereby agree that the Unit appropriate for collective bargaining purposes, hereinafter called the Union shall consist of "all guards of E. C. Atkins Company, excluding Captain, Director and Assistant Director, and all other employees."

Section 3. Union Shop. The employees of the Company within the Unit described in Section 2 of this Article shall become members of the Union Within thirty (30) days after the effective date of this Agreement, and as a condition of employment shall remain members in good standing in the Union during the life of this Agreement. New employees and employees now serving their probationary period shall become members of the Union at the expiration of their probationary period and shall remain members in good standing in the Union as a condition of employment during the life of this Agreement.

Article II—Representation.

Section 1. Shift Committeemen. The Union shall appoint or elect not more than one (1) Shift Committeeman for each shift or crew. It shall be the duty of the Shift Committeeman to take up with the proper Company officer

grievances or suggestions from employees on his shift or crew.

Section 2. Negotiating and Grievance Committee. The Negotiating and Grievance Committee shall consist of four (4) members and shall handle grievances or suggestions referred to them by the Shift Committeeman, which are not satisfactorily adjusted by the Shift Committeeman. Representatives of District No. 90 and the International Union may be present at any, or all, of the meetings for the purpose of collective bargaining, or the handling of grievance matters.

Section 3. Change in Union Officers. The personnel of the Shift Committee and the Negotiating and Grievance Committee shall be certified to the Company and the Union shall promptly advise the Company of any changes in such personnel as they occur.

Section 4. Regular Meetings. Company representatives and the Negotiating and Grievance Committee shall meet monthly for the purpose of considering any grievances, suggestions, or other matters ordinarily considered at such joint meetings. In case an emergency arises, meetings may be held more often by mutual agreement.

Article III—Grievance Procedure.

Section 1. Steps in Procedure. It is agreed that grievance procedure shall be as follows:

A. Whenever an employee in the Unit believes that the Company is violating any part of this Agreement, or that he is being unjustly or unfairly dealt with by any officer or agent of the Company, he may go to either the Sergeant on his shift, or Shift Committeeman and state his grievance or suggestion. The Sergeant, the employee, and the Shift Committeeman shall make every honest effort to adjust all grievances or complaints.

B. If, under Section A, adjusting of the employee's grievance is not reached within three (3) days, the matter shall be referred to the Negotiating and Grievance Committee by the employee or the Shift Committeeman. The Sergeant shall refer the matter to the Captain, or the Director of the Plant Protection Force.

C. If the Negotiating and Grievance Committee is unable to reach a satisfactory adjustment with the Captain, or the Director of the Plant Protection Force, the Committee shall then appeal the matter to the Executive Officers of the Company. In this final step the Company and the Union, either separately or jointly, may invoke the aid of the Conciliation Service of the United States Department of Labor, or any other United States Government or a State Government Agency that may have jurisdiction over the matters in dispute.

D. An aggrieved employee shall be subject to call by the Company or the Union to appear in any or all of the foregoing conferences for the purpose of giving testimony having a bearing on the case. Likewise, equal rights shall be given the aggrieved employee to be present at such conferences on his own initiative, providing such desire is presented in writing to the Negotiating and Grievance Committee within five (5) days from the initial date of filing the grievance.

Section 2. Records. All grievances shall be in writing and in duplicate. When a grievance has been settled or adjusted one copy will be filed by the Company and one by the Union as a matter of permanent record; providing, however, that if a grievance is adjusted between the Shift Committeeman and the Sergeant, no written record is required. All cases handled by the Negotiating and Grievance Committee shall be in writing, and the Company shall give written decisions on each separate case, a copy of such written decision to be sent to the Office of District No. 90.

Section 3. Appeal. Any alleged grievance not appealed from a decision at one step of the procedure to the next step within five (5) days of the Company's written decision shall be conclusively presumed to be settled on the basis of the last decision which decision shall be binding and not subject to further appeal.

Article IV—Discharge.

Section 1. Discipline. The Company shall have the right to discharge, suspend, or discipline any employees for cause or violation of any of the Company's posted

rulings or regulations. Any employee discharged, suspended, or otherwise disciplined who feels that he has been unjustly dealt with by the Company's representatives or agents shall have recourse through the grievance procedure provided in Article III of this agreement. If an employee, after investigation, is found to have been unjustly discharged, or suspended, he shall be reinstated without loss of seniority and paid for time lost less any wages received from other employment during such period of lost time.

If a discharged, or suspended employee fails to present his discharge or suspension as a grievance by the end of the second full working day after his discharge or suspension, such discharge or suspension shall be considered as final and no grievance based thereon shall be considered.

Article V—General Working Conditions.

Section 1. Work Stoppage. The Union agrees that there shall be no strikes, stoppages, or boycotts during the life of this agreement.

Section 2. Lockout. The Company agrees that there shall be no lockout or discrimination during the life of this agreement.

Section 3. Uniforms and Equipment. The Company agrees to furnish all uniforms and equipment to the employees coming under the provisions of this Agreement, and further agrees to replace any badly worn uniforms, over-coats, rain-coats, and hats, and any other equipment necessary to carry out the duties assigned to them, provided the employee does not abuse this equipment by improper care, or by wearing same off duty.

Section 4. Personal Appearance. Guards reporting for duty shall be neat in appearance, clean shaven, and in the uniform furnished for the season. Any guard violating this Section shall be subject to one day's suspension.

Section 6. Bulletin Boards. The Company shall provide a reasonable number of bulletin boards on which the Union may post notices of its recreational and social affairs and of Union elections and results thereof, appointments, and meetings. All such notices must be approved by the Com-

pany before being posted, and shall be countersigned by the officer of the Union. The Union shall promptly advise the Company of the officers who have the power to countersign such notices and shall provide it with their specimen signatures. There shall be no other distribution or posting by the Union or employees on the Company's property of pamphlets, advertising of political matter, notices, or any kind of literature other than herein provided.

Section 7. No Age Limit. So long as an employee is capable of performing his work, age shall not be a disqualifying factor either in hiring of new help or the continued employment of employees; provided, however, that the Company shall not be compelled to retain in its service any employee who is not qualified to perform his duties.

Section 8. Safety Committee. The Union shall be represented by at least one member on the Safety Committee.

Article VI—Seniority.

Section 1. Definition. Rights to promotion, preferences to shifts, and the right to remain in the service of the Company in case of reduction in force shall be governed by seniority subject to the provisions of this Agreement.

Section 2. Seniority Date. An employee's seniority shall begin on the date he enters the employ of the Company in the Unit, but he shall not be placed on the Seniority List and shall not enjoy the rights enumerated in Section 1 of this Article until he completes the probationary period as provided for in Section 3 of this Article.

Section 3. Probationary Period. All new employees shall be considered as on probation for a period of sixty (60) working days after their date of hiring, and there shall be no responsibility on the part of the Company for re-employment of probationary employees if they are laid off or discharged during this period.

Section 4. Layoffs. In the event of the reduction in force, the last employee hired shall be the first to be laid off. When necessary to increase the force after a layoff, the

last employee laid off shall be the first to be returned to service.

Section 5. Recall to Work. When it becomes necessary to lay off employees as much notice as possible will be given, but in any event such notice of layoff shall be not less than twenty four (24) hours. When calling employees to return to work after a layoff, the Company will ordinarily use Registered Mail, but in an emergency, the Company may notify some, or all, employees by phone, or in person, to return to work. Any employee who fails to return to work or get in touch with the Company within five (5) business days after the day his notice is mailed will be conclusively presumed to have resigned and his record shall be noted accordingly.

Section 6. Change of Address. Laid off employees shall keep the Company and the Union advised of any change of address. The Company is entitled to rely on the address furnished by the employees for all purposes within the meaning of this Agreement.

Article VII—Management of Plant.

The management of the Plant and the direction of the working forces, including the right to hire, suspend, or discharge, for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reasons is vested exclusively in the Company; provided, that this will not be used for purposes of discrimination against any member of the Union.

Article VIII—War Department Regulations.

It is understood that for the duration of the war this Agreement is in all respects subject to the provisions of the Directives of the War Department concerning Military Organizations of the Plant Guard Forces (WD Directive, July 2, 1942, Ag 231.43; SOS Circular ....., 1942; and any amendments thereto), and that nothing contained in this Agree-

ment shall be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the Company Guard Force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police.

Article IX—Leave of Absence.

Section 1. Requested Leave. Leave of absence may be granted to an employee for reasons such as: Jury duty, attending convention, or voluntary military duty in defense of the United States and for other valid reasons. Request for leaves of absence must be made to the Director of Plant Protection in writing and each case will be decided on its merits. The employee shall not lose his seniority during such leaves of absence. An employee laying off from work without notice, or just cause may be subject to loss of seniority.

Section 2. Military Leave. Any employee called to compulsory military duty shall retain his seniority and the Company shall reinstate such employee within forty (40) days after his return, provided, however, that he pass the physical examination as given on entering the service of the Company, and if a layoff period is in effect which would have included such employee had he been working, it shall be effective as to him.

Section 3. Failure to Return. Employees not returning upon the expiration of their leave shall be considered to have quit voluntarily.

Section 4. Records. The Bargaining Committee shall be supplied monthly with copies of the names of all employees on leave of absence for more than a week.

Article X—Duration.

Section 1. Time of Expiration. This Agreement shall remain in force for one (1) year from the date hereof, and shall automatically renew itself from year to year unless

written notice of desire to terminate or to modify any portion or any of the terms hereof is given, by either party to the other at least thirty (30) days prior to the expiration of any such annual period.

Amendments may be made from time to time by mutual agreement.

Section 2. Effective Date. This Agreement shall be effective at once, except that part which is subject to War Labor Board approval. The Company and the Union will jointly apply to the War Labor Board for their approval from the date of signing.

Section 3. Supplements. There is attached hereto and made a part hereof Supplement No. 1, governing hours of work, and Supplement No. 2, governing wage rates. Because of present economic conditions it is agreed that Supplements Nos. 1 and 2 may be revised or amended by agreement between the Company and the Union on three (3) days' notice from either party and without disturbing any of the other Articles of this Agreement.

Article XI—Vacations.

Section 1. Eligibility. Employees who have one (1) year or more of continuous service in the Unit shall be entitled to a vacation of one (1) week.

Section 2. Vacation Pay. Employees entitled to a vacation under Section 1, of this Article, shall be paid forty (40) hours at the hourly rate received the last pay period in June of each year. Vacation pay checks shall be delivered to the employee before his vacation starts.

Section 3. Vacation Period. All vacations shall be taken between July 15, and September 30, of each year, and must be arranged for in advance with the Director of Plant Protection.

Section 4. Foregoing Vacations. Any employee who is entitled to a vacation and, on request of the Company, does not take it, shall be paid his vacation pay in addition to earnings on the job.

In witness whereof, the parties hereto have executed this agreement as of this date, ... 194...

For the Employees International Association of Machinists, District #90, Local Lodge #1683	For E. C. Atkins Company
.....	.....
	President.
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
Negotiating Committee.	

Supplement No. 1.

Hours.

Section 1. The work week shall consist of seven consecutive days beginning on Monday of each week. The work day shall be the calendar day from midnight to midnight. Each employee shall have a designated time at which work day commences.

Section 2. The first forty (40) hours of work in any work week, not exceeding eight (8) hours in any one day, shall be paid for at the regular rate. Work in excess of forty (40) hours in any work week, or in excess of eight (8) hours in any one day, shall be paid for at one and one half times the regular rate.

Section 3. Subject to the provisions of Executive Order #9240 and of Section 2, of this Supplement, when an employee works six (6) consecutive days in a work week, time and one half shall be allowed for time worked in the sixth (6th) consecutive work day in any work week; also time and one half shall be allowed for time worked on New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day.

Section 4. Subject to the provisions of Executive Order #9240, when an employee works seven (7) consecutive days, double time shall be allowed for all work done on the seventh (7th) consecutive work day in any work week.

Section 5. Each shift worked will be counted as of the work day in which the shift began. For example, a shift works from 11:00 P. M., Monday until 7:00 A. M. Tuesday, would be counted as of Monday.

Section 6. When a holiday is not observed, that is, when shifts operate as usual on a holiday, time and one half will be paid only for the shift that begins on the holiday.

Section 7. No employee shall be laid off during the regular work day or work week without pay for the purpose of avoiding overtime payment.

Section 8. The Company reserves the right to change shift hours within the limitations of Executive Order #9240, however, before any change is made in shift hours, either in the number of hours worked per week, or the starting time of shifts, the Bargaining Committees shall be advised in advance and given an opportunity to present objections which will be given consideration before any such change shall become effective.

Supplement No. 2.

Wages.

Wages for all employees alike coming under the provisions of this agreement shall be as follows:

Hiring rate	.75 per hour
After 30 days	.80 per hour
After 90 days	.90 per hour
After 6 months	1.00 per hour

None of the provisions of Supplement No. 2 shall be effective until approved by the National War Labor Board and when so approved they shall become effective as of the beginning of the work week which commenced on ...., 194....., unless some other effective date is prescribed by the National War Labor Board.

BOARD'S EXHIBIT NO. 103.

(Copy)

E. C. ATKINS AND COMPANY
402 South Illinois St.
Indianapolis 9, Ind., U. S. A.
December 20, 1943

International Association of Machinists
District #90, Local 1683
49½ South Delaware Street
Indianapolis, Indiana

Attention: Mr. F. M. Richardson
Business Representative

Dear Sir:

This will acknowledge receipt of the proposed form of contract to be entered into between the International Association of Machinists, District #90, and its affiliated local lodge #1683, and the E. C. Atkins and Company.

You have doubtless been advised of the position heretofore taken by our Company that the auxiliary military police which you represent are in no sense employees of our Company and that consequently we have no obligation under federal or state law to bargain with you as their representative.

Under the circumstances may we suggest that you take such other action as you see fit to establish our obligation to bargain with you respecting such auxiliary military police.

Yours truly,
E. C. Atkins and Company,
/s/ Cyrus E. Wood,
Cyrus E. Wood,
Personnel Director.

CEW:as

BOARD'S EXHIBIT NO. 104.

(Copy)

BARNES, HICKAM, PANTZER & BOYD
Attorneys at Law
Indianapolis 4, Indiana
December 22, 1943.

E. C. Atkins and Company
Case No. 9-R-1200
Mr. John Getreu
National Labor Relations Board
Architects Building
Indianapolis, Indiana

Dear Mr. Getreu:

This will follow up our telephone conversation of today, in which you advised that International Association of Machinists, District 90 and their Affiliate, Local 1683, filed a charge of unfair labor practice against my client, E. C. Atkins and Company, for refusal to bargain, and asked me to state the position of my client.

I think the position is well stated in the letter which E. C. Atkins and Company wrote the Union when it was requested to bargain, which letter you said you had already read.

The reasons supporting the position stated in the letter are best set forth in the two briefs which our firm prepared and filed in behalf of E. C. Atkins and Company with the National Labor Relations Board. I enclose copies of each. You will note we asked for oral argument, which we were never accorded. Furthermore, the Board in its Decision completely disregarded the absolutely undisputed evidence by failing to find any of the facts favorable to our contentions. In addition, the Board depended chiefly upon cases relating to facts which antedated the military orders, which constituted the main basis of our case. Under the circumstances, we feel we are entitled to a review of the entire situation by a court that will at least grant us a hearing upon the facts.

You understand, of course, that in the position taken by

E. C. Atkins and Company, there is no personal animosity toward you or the Regional Office at Cincinnati, and that the feelings of the executives of E. C. Atkins and Company and myself are, of course, most friendly toward Mr. Richardson, the Union organizer.

I am with kind regards,

Sincerely yours,

/s/ Kurt Pantzer.

KFP/TB
Encls.

SUPPLEMENTAL APPENDIX TO PETITIONER'S BRIEF.

In the

United States Circuit Court of Appeals
For the Seventh Circuit

No. 8669

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

U. S. C. C. A. - 7
FILED
OCT 3 - 1944
KENNETH J. CARRICK
CLERK

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UNITED STATES OF AMERICA.

NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, affiliated with the American Federation of Labor.	Case No. 9-C-1982.

STATEMENT OF EXCEPTIONS TO INTERMEDIATE REPORT, RECORD, AND PROCEEDINGS.

The Respondent, E. C. Atkins and Company, herewith files its statement in writing setting forth its Exceptions to the Intermediate Report and to other parts of the record and proceedings in this cause (including rulings upon all motions or objections), and in support thereof alleges:

I.

Definitions.

National Labor Relations Board is hereinafter referred to as the "Board."

E. C. Atkins and Company, the Respondent herein, is hereinafter referred to as the "Respondent."

International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, the Complainant herein, is hereinafter referred to as the "Union."

Case No. 9-R-1200, entitled "In the Matter of E. C. Atkins and Company and International Association of Machinists,

District 90 and their affiliate, Local 1683, Petitioner," Notice of Hearing in which was dated September 16, 1943, and hearing in which was held September 24, 1943, is hereinafter referred to as the "Representation Case."

The Decision and Direction of Election, dated October 19, 1943, in the Representation Case, is hereinafter referred to as the "Decision in the Representation Case."

The "Certification of Representatives," dated November 29, 1943, in the Representation Case, is hereinafter referred to as the "Certification of Representatives."

Case No. 9-C-1982, entitled "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their Affiliate Local 1683, Affiliated with the American Federation of Labor," Notice of Hearing in which was dated January 12, 1944, and hearing in which was held January 31, 1944, is hereinafter referred to as the "Unfair Labor Practice Case."

The "Intermediate Report," dated February 19, 1944, in the Unfair Labor Practice Case, is hereinafter referred to as "Intermediate Report in the Unfair Labor Practice Case."

II.

Exceptions to Findings of Fact.

The Respondent excepts to the Findings of Fact for the reasons stated:

A—Exceptions to Decision in Representation Case.

Exception No. 1. There is no finding in Finding of Fact II, entitled "The organization involved" that either (a) the "employees" of the Respondent referred to are the Plant Guards which were the subject matter of the representation proceedings, or (b) the "employees" admitted to membership in the Union were "employees" of the Respondent within the meaning of Section 2, clause 3, of the National Labor Relations Act.

Exception No. 2. There is no finding in the entire Find-

ings of Fact that the Plant Guards stationed at the two Indianapolis Plants of the Respondent were "employees" within the meaning of any provision of the National Labor Relations Act.

Exception No. 3. There is no finding in the Findings of Fact that the Respondent was an "employer" of the Plant Guards stationed at the two Indianapolis Plants of the Respondent within the meaning of Section 2, clause 2, of the National Labor Relations Act.

Exception No. 4. There is no finding which sets forth as existing between the Respondent and the Plant Guards stationed at the two Indianapolis Plants of the Respondent any of the incidents of "employer" and "employee," as such incidents existed at common law, other than the inferential finding that "in the Dravo corporation case, the Board fully discussed the question as to whether the militarization of guards alters the character of their employment, stating therein that the relationship of employer and employee still exists despite such militarization"; and such incorporation by reference of facts which may or not have existed in the Dravo Corporation case does not constitute a finding of fact with respect to the instant case within the meaning of Section 9 or Section 10 of the National Labor Relations Act so as to form the basis for a valid decision or order, as the case may be, in a representation case or an unfair labor practice case before this Board.

Exception No. 5. The finding that the facts in the instant case inferentially resembled the facts in the Dravo Corporation case is not a finding of fact upon the record in this case so as to make any decision or order rendered upon such inference or conclusion a binding order within the meaning of due process, as used in the Fifth Amendment to the Constitution of the United States; and consequently the Findings of Fact, Conclusions of Law, and Decisions, Directions and Orders heretofore rendered by the Board in this case are void and of neither judicial nor administrative effect.

Exception No. 6. The Board failed to find any of the facts (uncontrovertibly established by the overwhelming weight of the testimony) existing in the instant case, which

differentiate the instant case from the facts found in the Dravo Corporation case, to wit:

(a) The "Agreement Between the United States of America and ..... Plant Guard," executed between each Plant Guard and the United States upon assuming a position as Plant Guard at the two Indianapolis Plants of the Respondent. (Employer's Ex. No. 2.)

(b) The special "Plant Guard Identification Guard," executed by Plant Guards, issued by the Auxiliary Military Police for Plant Guards stationed at the two Indianapolis Plants of the Respondent (Employer's Ex. No. 3); as opposed to the identification cards issued by the Respondent to its employees stationed at the two Indianapolis Plants of the Respondent. (Employer's Ex. No. 21.)

(c) The oath of office taken by each Plant Guard as a civilian auxiliary to the Military Police. (Employer's Ex. No. 2.)

(d) The four orders issued by the Continuous Security District Office of the War Department at Cincinnati, Ohio, dated May 10, 1943, May 11, 1943, May 12, 1943, and June 7, 1943. (Employer's Ex. Nos. 10, 11, 12 and 4.)

(e) Plant Guards are subject to court martial and were, and have been, court martialled, as members of the Military Forces. (Employer's Ex. Nos. 2 and 9.)

(f) General Orders of a Plant Guard, applying to all posts at the two Indianapolis Plants of the Respondent, are substantially similar in all relevant respects to the general orders of sentinels, as prescribed by the Basic Field Manual of the Soldier's Handbook, issued by the War Department for troops in active service on July 23, 1941. (Employer's Ex. Nos. 11 and 13.)

(g) Plant Guards are enrolled in the Auxiliary Military Police of the Army of the United States pursuant to a "Certificate of Enrollment," executed by a commissioned officer or officers of the United States Army. (Employer's Ex. No. 6.)

(h) Plant Guards who, upon discharge, have faithfully served as an auxiliary to the Military Police of the Army of the United States, are given a "Certificate of Meritorious Conduct," executed by a commissioned officer or officers of the United States Army. (Employer's Ex. No. 7.)

(i) Plant Guards who are discharged for cause are not entitled to a Certificate of Meritorious Conduct but are discharged informally by a commissioned officer of the United States Army. (Employer's Ex. No. 8.)

(j) The Respondent had no authority to hire any member of the Auxiliary Military Police but merely to recommend applicants for positions as Plant Guards, a commissioned officer in the United States Army, stationed in Cincinnati, Ohio, first investigating all such applicants and subsequently authorizing their permanent employment.

(k) The Respondent had no authority to discharge any member of the Auxiliary Military Police but merely to recommend discharge, a commissioned officer in the United States Army, stationed in Cincinnati, Ohio, having the sole right, after investigation, to effectuate a discharge.

(l) None of the incidents of the relationship between employer and employee at common law existed between the Respondent and the Plant Guards stationed at the two Indianapolis Plants of the Respondent with the sole exception of the incident that the Respondent paid the wages of such Plant Guards.

(m) The Respondent had absolutely no authority with respect to the duties of the Plant Guards stationed at the two Indianapolis Plants of the Respondent, or the way in which such duties were carried out.

(n) The Plant Guards stationed at the two Indianapolis Plants of the Respondent received their instructions and training at a special school conducted for the purpose by the United States Army.

And consequently such failure to find constitutes lack of due process in violation of the Fifth Amendment to the Constitution of the United States.

Exception No. 7. There is no support for the finding that "at a conference between the parties, the Company refused to recognize the Union, claiming that the unit requested was not appropriate." (page 2.) (See Transcript of September 24, 1943, pages 12, 17 and 87.) As a matter of fact the reason which Respondent assigned for not recognizing the Union was that the Plant Guards were not "employees" and the Respondent was not an "Employer," within the meaning of those words as used in the National Labor Relations Act.

Exception No. 8. The finding that "the Union represents a substantial number of 'employees' in the unit hereinafter found to be appropriate," is unsubstantiated by relevant testimony inasmuch as it is based upon the statement of a Field Examiner and evidence, which the Respondent never had an opportunity to examine or cross-examine, and such finding is consequently in violation of due process as prescribed by the Fifth Amendment to the Constitution of the United States.

Exception No. 9. There is no evidence that "a question affecting commerce has arisen concerning the representation of 'employees' of the Company within the meaning of Section 9(c) and Section 2(7) of the National Labor Relations Act."

Exception No. 10. There is no evidence to support the finding that "all plant guards at the Company's two Indianapolis Plants, * * * constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act."

Exception No. 11. The Trial Examiner erred in denying the Respondent's "Application for Subpoena Duces Tecum Directed at F. M. Richardson to Produce Union Records" (Employer's Ex. No. 1) because such denial constituted a deprivation of due process under the Fifth Amendment to the Constitution of the United States.

Exception No. 12. The Trial Examiner erred in admitting in evidence, over the objection of the Respondent, "Statement of Field Examiner Concerning Claims of Authorization for the Purpose of Representation," dated September 11, 1943 (Board's Ex. No. 4), inasmuch as the Re-

spondent was not permitted to cross-examine the individual who made the statement and to examine the data on which it was based, thereby depriving the Respondent of due process as guaranteed by the Fifth Amendment to the Constitution of the United States.

B—Exceptions to the Intermediate Report in the Unfair Labor Practice Case.

Exception No. 13. The finding that "Local 1683 admits to membership plant guards 'employed' by the respondent," is unsubstantiated by the evidence in the record or by any evidence found in the Findings of Fact.

Exception No. 14. There is no finding that the Plant Guards were "employees" of the Respondent within the meaning of that word as used in the National Labor Relations Act.

Exception No. 15. There is no finding that the Respondent was an "employer" within the meaning of that word as used in the National Labor Relations Act.

Exception No. 16. The statement that "no contention was advanced in the present proceeding attacking the Board's allegation that the Union is still the representative of the majority of the employees in the appropriate unit" is unsupported by the evidence because of the allegation of paragraph 4 of the "Answer of Respondent, E. C. Atkins and Company."

Exception No. 17. The finding (lines 21 to 32 of the Intermediate Report in the Unfair Labor Practice Case) that "all the plant guards * * * constitute a unit appropriate for the purposes of collective bargaining" in accordance with the "Board's previous determination of the unit question," is void because it is based entirely upon its determination of the same question in the Representation Case. Inasmuch as the determination in the Representation Case was based upon facts supporting the finding and was in disregard of uncontrovertible facts established by the overwhelming weight of the testimony in the Representation Case which differentiate the Representation Case from the facts in the Dravo Corporation case, such further finding in

the Unfair Labor Practice Case is also unsupported by the evidence.

Exception No. 18. The Intermediate Report in the Unfair Labor Practice Case has failed to re-examine the facts in the Representation Case or to examine such facts anew in the Unfair Labor Practice Case, all as set forth in the two briefs filed in the Representation Case and resubmitted as part of the record in the Unfair Labor Practice Case. (Board's Ex. Nos. 105 and 106.)

Exception No. 19. There is no evidence that "a question affecting commerce has arisen concerning the representation of 'employees' of the Company within the meaning of Section 9(c) and Section 2(7) of the National Labor Relations Act."

Exception No. 20. The Trial Examiner erred in denying the "Application for Subpoena Duces Tecum Directed at F. M. Richardson to Produce Union Records" (Respondent's Ex. 101) because such denial constituted a deprivation of due process under the Fifth Amendment to the Constitution of the United States.

Exception No. 21. There is no evidence to sustain the finding that "the Respondent refused to bargain collectively with the Union as the exclusive representative of the 'employees' in the appropriate unit, and that the Respondent has thereby interfered with, restrained and coerced its 'employees' in the exercise of the rights guaranteed in Section 7 of the Act," because the Plant Guards are not "employees" of the Respondent.

Exception No. 22. There is no evidence to support the finding that "the activities of the respondent * * * have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

III.

Exceptions to Conclusions of Law.

The Respondent excepts to the following conclusions of law for the reasons stated:

A—Exceptions to Decision in Representation Case.

Exception No. 23. The Board was in error in directing an election by secret ballot among the Plant Guards, inasmuch as such Plant Guards were not "employees" of the Respondent, and to the extent that such direction of election was intended to bind the Respondent as the "employer" of such Plant Guards.

Exception No. 24. The direction of election is void because the facts found by the Board do not warrant such a direction of election as against the Respondent.

Exception No. 25. The direction of election is not supported as a matter of law and is in violation of due process as prescribed by the Fifth Amendment to the Constitution of the United States.

B—Exceptions to the Intermediate Report in the Unfair Labor Practice Case.

Exception No. 26. The conclusion that the Union is a "labor organization within the meaning of Section 2(5) of the Act" is unsupported by any evidence if the implication is to be drawn therefrom that such Union numbers among its membership any "employees" of the Respondent within the meaning of that word as used in the National Labor Relations Act as concluded in paragraph 1.

Exception No. 27. There is no evidence to support the conclusion that "all plant guards * * * have constituted a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act," as concluded in paragraph 2.

Exception No. 28. The Union has never been the "exclusive representative of all 'employees' in said unit,"

within the meaning of the word "employees" as used in the National Labor Relations Act, as concluded in paragraph 3.

Exception No. 29. The Respondent at no time refused to bargain collectively with any exclusive representative of its "employees," as concluded in paragraph 4.

Exception No. 30. The Respondent has never, with reference to the Plant Guards stationed at its two Indianapolis Plants, interfered with, restrained, and coerced "employees" in the exercise of the rights guaranteed in section 7 of the Act or engaged in any unfair labor practices within the meaning of Section 8(1) of the Act, as concluded in paragraph 5.

Exception No. 31. The Respondent at no time was guilty of any unfair labor practices as concluded in paragraph 6.

IV.

Exceptions to Recommendations in the Intermediate Report in the Unfair Labor Practice Case.

Exception No. 32. Recommendation 1 is not supported by the facts or the law because the Plant Guards at the two Indianapolis Plants of the Respondent are not "employees" of the Respondent as an "employer," within the meaning of those two words as used in the National Labor Relations Act.

Exception No. 33. Recommendation 2 is not supported by the facts or the law because the Plant Guards at the two Indianapolis Plants of the Respondent are not "employees" of the Respondent as an "employer," within the meaning of those two words as used in the National Labor Relations Act.

V.

General Exceptions.

The Respondent further excepts to the Intermediate Report, Record, and Proceedings in this case, for the reasons stated:

Exception No. 34. The relationship of employer and

employee, with its various incidents, has never existed as between the Respondent and the Plant Guards in the instant case, and consequently the relationship between the Respondent and such Plant Guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act.

Exception No. 35. The Union purports to represent Plant Guards at various other plants in the Indianapolis area, which Plant Guards have not been sworn into the Military Service under the articles of war; and the collective bargaining agreements executed between the Union and the corporations at which such Plant Guards are stationed, respectively, would, if produced by the Union, have been shown to contain provisions respecting seniority, discipline, handling of grievances, vacations, hours of work, and other incidents of tenure, which are incompatible with the articles of war and military orders pursuant to which the Auxiliary Military Police at the Plants of the Respondent are subject to the jurisdiction of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and consequently any order directing the Respondent to bargain with respect to such incidents of employment with the Plant Guards at the Plants of the Respondent is void and of no force and effect.

Exception No. 36. The Decision in the Representation Case and the Intermediate Report in the Unfair Labor Practice Case are both void because the National Labor Relations Board denied the repeated written requests of the Respondent for permission to appear before the Board and make oral argument of the issues raised by the Respondent; the Respondent never having been permitted to address argument respecting Respondent's points to any member or representative of the Board, who prepared the Decision in the Representation Case, the Certification thereon entered November 29, 1943, or the Intermediate Report in the Unfair Labor Practice Case.

Wherefore, the Respondent prays that the Board accept the foregoing "Statement of Exceptions to Intermediate Report, Record, and Proceedings," filed for record on or

prior to Thursday, March 9, 1944 (the latter date being fifteen days from the date of the entry of the order transferring the case to the Board), in order that the Respondent's exceptions taken herein may be taken and protected pursuant to the provisions of Article I, Section 33, of the Rules and Regulations, Series 3, of the National Labor Relations Board; that the record in the Representation Case be made a part of the record in the Unfair Labor Practice Case as contemplated by the provisions of Section 9(d) of the National Labor Relations Act; that the Board accept the two briefs heretofore filed by the Respondent (Board's Ex. Nos. 105 and 106) as the briefs permitted by Section 33 of said Rules and Regulations; and that the Respondent be permitted to argue its points orally before the Board upon the issues raised by such Statement of Exceptions and said Briefs.

Dated at Indianapolis, Indiana, March 6, 1944.

E. C. Atkins and Company,
By Barnes, Hickam, Pantzer & Boyd,
By Kurt F. Pantzer,
Its Attorneys.
1313 Merchants Bank Building,
Indianapolis, Indiana.

Kurt F. Pantzer,
Lewis D. Spencer,
Of Counsel.

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1 BEFORE THE NATIONAL LABOR RELATIONS BOARD,

Ninth Region.

In the Matter of:
E. C. Atkins and Company
and
International Association of Machinists, District 90 and their affiliate, Local 1683.
} Case No. 9-R-1200.

Room 247, Federal Building,
Indianapolis, Indiana,
Friday, September 24, 1943.

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 o'clock p. m.

Before:

Thomas E. Shroyer, Trial Examiner.

Appearances:

Mr. Kurt F. Pantzer, 1313 Merchants Bank Building, Indianapolis, Indiana, and Mr. Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana, for E. C. Atkins and Company.

Mr. F. M. Richardson, 49½ South Delaware Street, Indianapolis, Indiana, and Mr. Walter B. Heisel, Jr., 49½ South Delaware Street, Indianapolis, Indiana, for the International Association of Machinists.

• • • • •

3 PROCEEDINGS.

Trial Examiner Shroyer: The hearing will come to order. This is a formal hearing in the matter of the E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683.

• • • • •

Trial Examiner Shroyer: May I ask if there are present at the hearing any other interested unions or parties? Let the record show that no one answered the Examiner's question. I believe you stated you had a motion to make, Mr. Pantzer?

Mr. Pantzer: I have. I wish to say that my motion at this time would be premature, and so I shall renew it at the close of all the evidence. The employer, E. C. Atkins and Company, moves to dismiss the petition for investigation, which is included in Board's Exhibit 1, for the reason that E. C. Atkins and Company is not and cannot be an employer within the meaning of Section 2, Subsection 2 of the National Labor Relations Act with respect to Auxiliary Military Police who wholly constitute the bargaining unit set forth in Item 4 of the Petition for Investigation, and further, for the reason that the employees referred to in such Petition cannot come within the definition of the word "employees" under the provisions of Section 2, Subsection 3 of the National Labor Relations Act with respect to the alleged employer, E. C. Atkins and Company, they are not in the sense in which the word "employee" is used in the Statute, the relationship of employer and employee with their various interests never having set in and not at this time existing.

Trial Examiner Shroyer: At this time the testimony will refer to motion to dismiss and go to the Board for ruling. You may renew your motion at the close of the hearing if you desire.

Mr. Pantzer: For the purpose of the record then, if you are going to refer it to the Board, so that there will be no failure on my part through oversight, I wish the motion to be renewed.

Trial Examiner Shroyer: It may be so considered.

Mr. Pantzer: Does that have your permission?

Mr. Richardson: Yes, sir.

Mr. Pantzer: Thank you.

* * * * *

Trial Examiner Shroyer: Mr. Richardson, do you accept the statement?

Mr. Richardson: I do, yes, sir.

Trial Examiner Shroyer: It may be so accepted. Thank you very much, Mr. Pantzer, for a very complete statement. I appreciate it.

Mr. Pantzer: We are also willing to make the admission that we are engaged in interstate commerce within the meaning of the jurisdictional provisions of the National Labor Relations Act.

Trial Examiner Shroyer: Thank you very much. Mr. Pantzer, will you stipulate that International Association of Machinists, District 90 and their affiliate, Local 1683, is a labor organization, at least within the meaning of Section 2, Subsection 5, National Labor Relations Act?

Mr. Pantzer: Naturally, because of the motion I made at the beginning of the case, I should prefer not to enter into that stipulation but to hear the evidence on it, and if I might at this moment depart from the usual order of procedure in these hearings, I should like to submit to you an application for subpoena duces tecum directed at F. M. Richardson to produce union records, which I have marked for identification as Employer's Exhibit No. 1, the original of which I hand to you, and a copy of which I hand to Mr. Richardson for his information.

Trial Examiner Shroyer: I notice, Mr. Pantzer, you marked this Employer's Exhibit No. 1.

Mr. Pantzer: For identification.

Trial Examiner Shroyer: Is there any objection?

Mr. Richardson: No objection.

Trial Examiner Shroyer: There being no objection, Employer's Exhibit No. 1 is admitted.

(Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 1 was received in evidence.)

Trial Examiner Shroyer: Now, with reference to the application for subpoena duces tecum directed at Mr. Richardson, the testimony will correct the application insofar as Number one is concerned, for the charter, constitution, and bylaws of the union. I wish, however, Mr. Pantzer, before I rule the second part, if you will state for the record just how the things requested under Number 2 would go to show whether or not this was a labor organi-

zation within the meaning of Section 2, Subsection 5½. Do you wish to comment further than the motion and the
12 paper itself?

Mr. Pantzer: It is the contention of the Employer that the word "Employee" as used in the Wagner Act has the common law definition of "Employee" and that the word "Employer" has the common law definition of "Employer" except to the extent that the Wagner Act may expressly have changed the meaning at common law. That position has been supported by a number of decisions of the Supreme Court, notably the decision of Chief Justice Hughes in the VonSteigl case. When I stated that the incidence of the relationship of employer and employee at common law remained the same under the Wagner Act except to the extent that those incidents might have been changed. One of those incidents which had been changed was, as the Examiner said, the right to discharge an employee for striking. He said, "The right so to discharge had existed at common law unless it was affected by the language of the Act, continued." He pointed out that the language of the Act had changed. That incident had abrogated the right to discharge for striking, but that it had not abrogated any of the other incidents of discipline, of power over the employee that the employer had at common law. With that preface now, I turn to the question of the Examiner. It is the contention of the Employer that the search of the documents referred to in Item 2 of the Application for subpoena duces tecum will throw a light
13 upon the major thesis of the Employer; namely, that the relationship of the employer and employee cannot exist in the case of an employer subject to Federal supervision by the Military and an employee actually enrolled in and sworn into the Military. Many of the incidents of the relationship between employer and employee at common law are not abrogated and do not and cannot exist under such circumstances.

Now, for instance, the minute book of the union may well throw light upon the manner in which the union proposes to proceed. If the purposes of organizing this par-

ticular union are sufficiently definite, we may even establish by the facts adduced from that book that the union is attempting to organize employees of the United States, which is expressly prohibited by the Wagner Act.

Certainly those documents will help to throw light upon the relations which exist in this particular case—constrained, restricted, cramped, straight-jacketed as it is by Military supervision. I cannot say to you definitely what particular fact I shall find in those books. They have not been made available to me, but it is the same kind of information which the Labor Board is accustomed to experience from employers—lists of employees, minute books, correspondence, corporate records, pay rolls, treasury data, matters of that sort.

14 Trial Examiner Shroyer: At this time the Examiner will acknowledge your request for subpoena duces tecum as to the items mentioned in Number 2 of your request.

With reference to the charter or constitution and bylaws, do you have those available, Mr. Richardson?

Mr. Richardson: Yes.

Trial Examiner Shroyer: Do you have them with you?

Mr. Richardson: No, sir. I didn't carry a charter 3x4 feet.

Trial Examiner Shroyer: I suggest we take a five-minute recess and have them brought to the court room.

Mr. Richardson: Do you want that charter brought here?

Trial Examiner Shroyer: Yes. I have no doubt, Mr. Pantzer, you will be satisfied with a copy of the charter?

Mr. Pantzer: I should like to have a photostat of the thing made or a typewritten copy and have that put in evidence rather than deface the charter, which naturally you want to keep in as nice condition as possible.

Mr. Richardson: We have no photostatic copy. We have the charter, the constitution, and the bylaws.

Trial Examiner Shroyer: May I suggest we take a five-minute recess while you go and telephone your office girl and have her make a typewritten copy of what is on the

face of the charter and bring both the charter and the copy to the hearing. We will take a five minute recess.

15 (Whereupon a five-minute recess was taken.)

Trial Examiner Shroyer: Mr. Richardson informs me that he has made arrangements to have the constitution and bylaws brought in. We might skip that point for the moment and proceed.

• • • • •

17 Trial Examiner Shroyer: At this time, I am marking Board's Exhibit 4 for identification, which is a statement of field examiner concerning claims of authorization for the purpose of representation.

Mr. Pantzer: May the record show that it is not because of anything personal with Mr. Richardson and his associates that that position is taken, but for the reasons already indicated by the Employer's motions and statements heretofore.

Trial Examiner Shroyer: I will not hand Board's Exhibit 4 which I have marked to the parties for examination.

Mr. Pantzer: The Employer objects to the introduction of Board's Exhibit 4 for the reason that it purports to introduce into the record so that the information is not available, or subject, to examination or cross-examination by the Employer. Information from membership cards, the application for subpoena to adduce which has been

18 denied by the Trial Examiner. The Employer further objects to the introduction of Board's Exhibit 4 because the information therein contained is pure hearsay and further because the information therein contained is not the best evidence, being that the best evidence would be the membership cards themselves.

• • • • •

20 Q. What, in general, do guards do?

A. In general they guard the plant, supposed to obey all the general orders and specific orders which the Company asks us to obey.

• • • • •

21 Q. Now, with regard to workers, do you observe the production workers? Do you observe them at their

posts? Do guards go through the plant and watch production workers and what they are doing?

A. At times we do.

Q. If you see a production worker doing something wrong, what you thought was wrong, what would you do?

A. I would see my lieutenant and tell him and he probably would take it up with our chief or maybe, if the chief can't be located, he would see his foreman about it.

Q. In other words, if you saw a production worker doing something you thought was wrong or out of line
22 or might be sabotage, you would not correct that production worker. You immediately report to your superior?

A. Well, that depends. If he is doing something drastically wrong, right there, of course I would take it upon myself to protect the plant, but if it was a minor thing, of course, for instance, he got, oh, got a little bit up in the air about showing his pass, then I would; sometimes, not often, a fellow will really get up in the air about your asking him to show his lunch kit or open a package, well, I would report anything like that to the lieutenant and he would take it up with the proper one.

Q. Do you, when you are hired and go to work there, are you told to take any disciplinary action over anybody in the plant? Do you have any right to arrest anybody in the plant without first calling your superior?

A. Yes, we do.

Q. However, the main thing you do is report it to your immediate superior, is that right?

A. That's right.

Q. If you see things out of line?

A. Yes, regardless whether the arrest is made or not. It is reported to our superior.

Q. Immediately?

A. As soon as possible.

* * * * *

24 A. That's right. I have that in my billfold right now.

Q. May I look at that, please?

A. Here is the card.

Q. Have you an identification card?

A. Here it is.

Q. When you were enrolled at the Atkins plant then you signed this document which you have just produced
25 from your wallet, an unsigned copy of which, with all blanks vacant, marked Employer's Exhibit No. 2, I show to you. That is marked for identification.

A. That's right. It's identical.

Q. It's identical? And the blanks are filled in as follows: Are they not, Mr. Gann? The top blank has your name, Walter C. Gann? The next blank being the one in the second paragraph, has again your name, Walter C. Gann—the first one in the second paragraph? The second blank, E. C. Atkins and Company, and the third blank, 402 South Illinois Street, and then the contract is signed at the right, Walter C. Gann, and at the left, High A. Johnston, Chief of Guards, January 27, 1943?

A. That's right.

Mr. Pantzer: The Employer now offers in evidence Employer's Exhibit 2, giving a copy thereof to Mr. Richardson for his file.

Trial Examiner Shroyer: Is there any objection, Mr. Richardson?

Mr. Richardson: No.

Trial Examiner Shroyer: Admit it as Employer's Exhibit No. 2.

(Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 2 was received in evidence.)

26 Q. (By Mr. Pantzer.) You have produced from your wallet the identification card of which you spoke, entitled Plant Guard Identification Card, signed by B. R. Wetenhall, Captain Corps Military Police, District Plant Guard Officer, Continuous Security District Office, Cincinnati, Ohio, is that right?

A. Yes, sir.

Q. Now I ask you, in order that you don't have to put your card in evidence, and in that way not get it back, whether in all substantial particulars excepting the name, the date, and so forth, it is similar to the plant guard

identification card which I show you in photostatic form of Henry A. Johnston, and which I have designated as Employer's Exhibit No. 3?

A. Yes, sir.

Q. And this has been blown up and the blank put across it in white so as not to violate the regulations against counterfeiting such cards. Mr. Gann, that is the only reason it is blown up.

A. Surely, and that is identical with the guard picture which I have.

Q. I now offer Employer's Exhibit No. 3 in evidence and hand the copy to Mr. Richardson.

Trial Examiner Shroyer: Is there any objection, Mr. Richardson?

27 Mr. Richardson: No.

Trial Examiner Shroyer: If there is no objection, it is admitted as Employer's Exhibit No. 3.

(Whereupon, the documents heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 3 was received in evidence.)

Q. (By Mr. Pantzer.) Mr. Gann, in addition to signing the contract with the United States Government, which is Employer's Exhibit No. 2, you also were sworn in, is that right?

A. That's right.

Q. And in addition to that contract you took a verbal oath of office to support the Constitution of the United States in substance and the Military authorities?

A. Yes, sir.

Q. That oath was almost identical with certain of the language in the contract, is that not so?

A. That's right.

Q. Or do you recall?

A. Yes, that's right.

Q. You stated on your direct examination that you obey all general orders for the Company that it has to obey. Did you not mean all general orders?

A. No, the general orders are Government orders.

Q. They are Government orders?

A. And special orders are from the Company.

Q. By the general orders you mean they are issued by the Government itself?

A. That's right.

Q. And as between a Government order and a Company order, which do you consider as having priority?

A. Well—

Q. The Military?

A. I would say one would be just as important as the other. The general orders deals with our particular—deals with the guard at general, while special orders would deal with some particular post and I would say one was just as important as the other.

Q. Well, these special orders then relate to your military duties?

A. That's right.

Q. By whom are they issued?

A. They are issued by the company commander.

Q. Who is the company commander?

A. Mr. Wetenhall, of course, of the Government. I mean now the Government issues the general orders, but I mean we get all of the dope, procedure, from Mr. Wetenhall pertaining to the Auxiliary Military Police. The general orders originate from the Company.

Q. How do you spell that name?

A. Wetenhall, W-e-t-e-n-h-a-l-l.

Trial Examiner Shroyer: The same man who signed the card which he has in his possession and also Employer's Exhibit No. 3?

The Witness: Yes.

Trial Examiner Shroyer: Thank you.

Q. (By Mr. Pantzer.) It is not Mr., but captain, is it not?

A. That's right.

Q. And when you said "company orders" you did not mean the E. C. Atkins company, but the military company to which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall?

A. Well, that's true.

Q. Special orders come from that company?

A. What I meant was they are different from the general orders in this way, that they apply to a particular post while the general orders are for the whole guard in general.

Q. So that your obligations to carry out specific tasks are directed by Capt. Wetenhall, Lt. Scanlon, Chief Johnston, the four lieutenants under Chief Johnston, and the military regime that you are working with?

A. That's right.

Q. Do I understand that you swore to observe and obey the Articles of War?

A. That's right.

Q. Do I understand that you swore to observe and obey the Articles and these Articles are read to you and that you are required to study them?

A. Yes.

Q. Where does that course of instruction take place?

A. We have military school each Monday for a period.

Q. Where is that situated? At the plant?

A. At the Ipalco Club Building. Indianapolis Power and Light Building. Each Monday for a period of one hour.

Q. Located near the plant?

A. No, not near the plant.

Q. Under military supervision?

A. That is true.

Q. Who conducts the classes and instruction there?

A. An army lieutenant.

Q. Lt. Scanlon?

A. Lt. Scanlon.

Q. And he is a regular lieutenant?

A. That is right.

Q. He worked his way up through the ranks?

A. I imagine he did unless he got a commission.

Q. You don't know then?

A. No.

Q. When you undertake to arrest anyone while you are on your post, you do it by virtue of the authority of the Military authorities, is that not right?

A. That's right.

Q. Have you ever studied the Manual of Interior Guard Duty?

A. Yes, sir, when I first went to work at the plant, I studied the Interior Guard Book.

Q. You were familiar with the fact that your general orders are to take charge of this post and all plant and Government property?

A. That's right.

Q. "To walk my post in a military manner keeping always on the alert and observing everything that takes place within sight or hearing"?

A. Yes.

Q. "To report all violations of orders I am instructed to enforce"?

A. Yes.

Q. Who instructs you to enforce those orders?

A. The Government.

Q. The Military? The Military Government?

A. Military Government.

Q. Military Police?

A. That's right.

• • • • •

34 Q. That's right, as I understand it. But you were sworn in, I believe, on the 27th of January, is that the date on your card?

A. Yes, sir.

Q. From the 21st of January to the 27th of January you were an employee of E. C. Atkins and Company?

A. Yes, sir.

Q. They pay you whether you are their employee or whether you are a military policeman, but from January 27 you became a military policeman and were no longer an employee of E. C. Atkins and Company, as you had been up to January 27? Your status changed, did it not?

A. That's right. I wasn't a member of the Auxiliary Military Police until I was inducted January 27.

Mr. Pantzer: In order that the Trial Examiner and Mr. Richards may both follow the thought of this examination, I beg to offer in evidence Employer's Exhibit No. 4, which is the directive from which I have just cross-exam-

ined Mr. Gann and which has the paragraph that I referred to, Paragraph No. 25, in it. Mr. Richardson may want to do some redirect examination later on and I want to make the document available.

• • • • •

36 *Redirect Examination.*

Q. (By Mr. Pantzer.) Is this a local that repre-
37 sents employees of more than just the Atkins plant?

A. Yes, sir.

Q. What are the other plants represented?

A. Well, I know the Curtiss-Wright.

Q. The Curtiss-Wright Corporation, Propeller Division Plant in Indianapolis.

A. The Morris and Kentucky Avenue plant, isn't it?

Q. The old Marmon plant.

A. Yes.

Q. Are they all in the same local that's trying to organize the Atkins company?

A. That's correct.

Q. What other plants are represented in the membership of that local?

A. Marmon-Harrington Company, Merz Engineering, Indianapolis Tool and Die Company. The Marmon-Harrington Company manufactures tanks.

Q. For the armed forces, does it not?

A. I believe so.

Q. It is a pioneer in tank manufacture under the leadership of Col. Harrington.

A. That's right.

Q. The Tool and Die Company has no direct war contracts, has it?

Mr. Richardson: He is mistaken. It is not the
38 Tool and Die Company. It is the International Machine Tool Company, rather than the Indianapolis Tool and Die.

Witness: That was a mistake on my part.

Q. (By Mr. Pantzer.) If this union organizes the Atkins company it will not be a separate local covering just

so-called Atkins' employees, but employees of these other plants you have mentioned and perhaps other plants in addition thereto?

A. Well, I am not sure about that. I know only the guards of our plant and the guards of Fall Creek Ordnance are going to be the only guards under the one contract if it is recognized. I know that. But whether the guards of all plants are under the same charter, I do not know.

• • • • •

39 Q. I notice in an answer of one of Mr. Pantzer's questions, you said the company may have special orders that they wish to perform. Have you ever been directed to carry on any special orders?

A. Yes, at one post in particular, where the trucks come in and of course they go out at another gate, unless it is a necessity that they go out that same gate. We have a special order pertaining to those trucks, once in a 40 while a special order.

Q. What kind of an order would you have as an example?

A. Well now, we have certain truck companies that get in on a little different procedure from what other companies do and we may receive special order through that one particular company, see? Of I mean we may receive a special order pertaining to that one company.

Q. Who gives the special order?

A. From the chief.

Q. That is all.

Trial Examiner Shroyer: Are there any further questions?

Mr. Pantzer: Yes.

Recross Examination.

Q. (By Mr. Pantzer.) Yes, you said in answer to a question by the Trial Examiner that Mr. Woods and Mr. Atkins were your supervisors. As a matter of fact, they are not your supervisors?

A. I didn't mean—I didn't understand what he said.

Q. I thought your answer was wrong.

A. You meant of the guards. I didn't understand that. I meant over the guard.

Q. Is it not true that the person superior to Chief Johnston is in the Military Police structure, or do you actually know?

41 A. Oh, yes, I am absolutely sure.

Q. The captain we referred to there is Capt. Wetenhall who signs all major orders down in Cincinnati?

A. That is right.

Q. He comes up and inspects at least once a month or once every two weeks, is that right?

A. I haven't ever been present when he came it. He goes in at the main office.

Q. You heard that he has been around?

A. Yes.

Q. Lt. Scanlon is under him?

A. That's true.

Q. And under him come the two chiefs, Chief Johnston at your plant and Chief Hann at the Fall Creek Ordnance plant?

A. That's right.

• • • • •

45 Q. I notice this is Local Lodge No. 1683. You heard the last witness testify to the effect the local admitted to membership employees of concerns other than the Atkins company?

A. That's right.

Q. Did he correctly state the names of the other companies?

A. Yes.

Q. Does Local Lodge No. 1683 have a contract with any of these other companies?

A. Yes.

Q. Will you mention the ones it does have a contract with?

A. It has a contract with everyone we mentioned—Curtiss-Wright, Merz Company, Marmon-Harrington, and International Machine and Tool.

Q. And those are contracts between the Local and the companies covering wages, hours, and working conditions?

A. Yes, sir.

• • • • •

47 Q. I refer you now to Petitioner's Exhibit No. 2 which is the typewritten copy of the charter and ask you whether any plant guards stationed at E. C. Atkins Company are charter members on that list?

A. They are not.

Q. Those names on that charter all come from other plants, is that right?

A. That's right.

Q. Do you have a closed shop at Curtiss-Wright Corporation?

A. We do not.

Q. Do you have a closed shop at any of the other plants?

A. We do.

Q. Which ones?

A. All three of the others that I mentioned.

Q. Are you going to attempt to obtain the closed shop at E. C. Watkins Company?

A. I wouldn't want to answer that question.

Q. Will you answer this question, whether or not in your campaign for membership you have told persons
48 that you would have a closed shop?

A. I didn't.

Q. Do you know whether those making solicitation of membership have made such statements?

A. I do not know.

• • • • •

52 Q. Do you have with you your plant card, that is, the Plant Guard Identification Card?

A. Yes, sir.

Q. Will you kindly produce it and compare it with Employer's Exhibit No. 3 and state whether or not Employer's Exhibit No. 3 is an accurate and enlarged photostatic copy of the front and reverse of your Plant Guard Identification Card?

A. That's it, yes, sir.

Q. State whether or not you can tell from the Plant Guard Identification Card when you were sworn in to the military service?

53 A. I can't tell from this identification. Yes, that is right. (Looking at it.) That is the new edition. That is not the one I originally went to work with.

Q. This pass supplants the old one which you had?

A. This pass supplants the old one which I had to turn in to the Federal Government.

Q. This one, Employer's Exhibit No. 3 is a reissue of the original card which you received?

A. Yes, sir. There have been some slight changes but it is the same basic thing.

Q. Do regular employees in the Production and Maintainance Departments of E. C. Atkins and Company have issued to them Plant Guard Identification Cards?

A. No, sir.

Q. They have issued entirely different identification cards?

A. Yes, sir.

Trial Examiner Shroyer: Mr. Pantzer, did you intend to offer that application of employment?

Mr. Pantzer: The Employer offers Exhibit No. 5 in evidence.

Trial Examiner Shroyer: Is there any objection? It may be admitted as Exhibit No. 5.

(Whereupon the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 5 was received in evidence.)

54 Q. (By Mr. Pantzer.) When you were finally notified that you had been accepted for the Auxiliary Military Police, did you then and only then sign a copy of Employer's Exhibit No. 2 by an agreement between the United States of America and yourself?

A. Well, that exhibit there is signed by the guard, the member of the Auxiliary Military Police. He is not yet a member. He signed that agreement and oath with the United States and that in turn is immediately forwarded to the Continuous Security District Office and then this pass is issued upon receipt after thorough checking has been given. It's issued on that contract. When you receive this pass then you know that you have been accepted by the Government as one of their representatives in the plant.

Q. If you had failed to sign that agreement, it is true is it not, and I read from Employer's Exhibit No. 4, Item 20: "If a guard refused to sign the agreement, he may, but need not be temporarily retained with the understanding that he will be dismissed as soon as he is replaced and in any event, within a reasonable time."

A. Yes, sir, that's true.

Q. So that if you had not signed the copy of Employer's Exhibit No. 2, which was submitted to you, you would have been dismissed?

A. That's right.

55 Q. You could not have continued to act as an Auxiliary Military Police at the Atkins plant?

A. No, you couldn't.

Q. Upon your having been sworn into the Service, state whether or not there was issued to you a certificate of membership?

A. Yes, sir, there was.

Q. I now show you Employer's Exhibit No. 6 and ask you whether that is a photostatic copy of the certificate of employment which is issued to you?

A. Yes, sir, that's it.

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit No. 6.)

Q. It is under that certificate that you hold your authority as an Auxiliary to the Military Police at this time?

A. That's right.

Q. I note that on that certificate the rank has been left blank. What is your rank?

A. I am the Chief, sir.

Q. Is this the commission that was issued to you when you became chief?

A. Yes, sir.

Q. In other words, I note it is dated June 29, 1943, although you originally joined in 1942?

56 A. Yes, sir, that's right.

Q. At that time you were promoted to chief?

A. No, sir, I have been chief all along.

Q. You were hired as chief?

A. Yes.

Q. Do you know whether any investigation of you was made prior to this, to your being appointed chief?

A. I have been told by army officers that there is a careful investigation made of each man and naturally if anything is found on the record proving that he is not the right type of man for that job, he is not allowed to become a member of the Auxiliary Military Police.

Q. That investigation is made by the Military Authorities?

A. Yes, sir, that is my understanding that it is made by the Cincinnati office.

Q. And it isn't made by the personnel office of E. C. Atkins and Company?

A. No, sir, not to my knowledge.

Q. So that your qualifications to serve as an Auxiliary to the Military Police of the Army of the United States are in the first instance examined by the United States Army and not by the personnel office?

A. That's right, yes.

Q. And you know that that is the process because since your appointment as chief you have become thor-
57 oughly conversant with the practices in that respect?

A. Yes, sir.

Q. I now show you—

Trial Examiner Shroyer: Did you offer?

Mr. Pantzer: I offer Employer's Exhibit No. 6 in evidence.

Trial Examiner Shroyer: If there is no objection, it is admitted as Employer's Exhibit No. 6.

(Whereupon the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 6 was received in evidence.)

Q. (By Mr. Pantzer.) I now show you Employer's Exhibit No. 7 and ask you what that is a photostatic copy of?

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit No. 7.)

A. That is an honorable discharge issued by the United States Government, Col. Rasmussen being the representa-

tive of the Government. That is an honorable discharge from the Auxiliary Military Police and it relieves a man from duty.

Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Company or the Military?

A. The Military discharges him from the Auxiliary Military Police. Now there is one thing that should
58 be said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty, he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company.

Q. That is true by virtue of Section 25 of the Directive which is Employer's Exhibit No. 4, which reads: "A member of the Auxiliary Military Police may not be employed, dismissed or may not resign if the plant guard officer or other responsible army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." Is that right?

A. That's right.

Q. Are members of the Military Police, Mr. Witness, ever discharged without an honorable discharge?

A. Yes, sir, they are.

Q. In other words, they are discharged for misconduct, absence without leave, drunkenness, for some military reason?

A. Yes, sir.

Q. I now show you Employer's Exhibit 8 and ask you whether that is the form in which such discharges take place, it being a discharge referring to the termination of Aye Eldridge.

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit 8.)

59 Mr. Pantzer: I offer them in evidence later.

A. Yes, sir, that would be a dishonorable discharge.

Q. I now show you Employer's Exhibit No. 9, entitled "The Articles of War" and Appendix 1 to a Manual for

Courts Martial, U. S. Army, and ask you whether or not that is a publication promulgated by the Military Police?

A. Yes, sir, you take these copies from the army office. That is the Articles of War.

Q. What do you know about the Articles of War?

A. Every soldier, every sailor, every marine, every member of the Auxiliary Military Police, according to the Articles of War, must have read to him within six days of his enlistment, must have read to him the Articles of War and also according to the Articles of War, he must have them read to him every six months thereafter. That is the Articles of War itself, I believe. These are the regulations under which a soldier lives.

Q. Now, how do you receive the general orders for your duties, from what source?

A. General orders are received from Capt. Wetenhall of the Fifth Service Command, Cincinnati.

Q. I now offer in evidence Employer's Exhibit 7, 8, and 9.

Trial Examiner Shroyer: Are there any objections?

Mr. Richardson: No.

60 Trial Examiner Shroyer: There are no objections and they may be admitted in evidence as 7, 8 and 9.

(Whereupon, the documents heretofore marked for identification as EMPLOYER'S EXHIBITS 7, 8 and 9 were received in evidence.)

Q. (By Mr. Pantzer.) I now show you Employer's Exhibits No. 10, 11 and 12 and ask you what they are.

(Whereupon, the documents above referred to were marked for identification as Employer's Exhibits 10, 11 and 12.)

A. These are general orders from Capt. Wetenhall of the Fifth Service Command District Plant Guard Officer, who is over all the Auxiliary Military Police in this District. These three orders take up different subjects and they are to be followed.

Q. Has General Order 4 been published as yet, to your knowledge?

A. Not to my knowledge, no, sir. These are the three general orders under which we are working.

Q. They are the three orders under which you work?

A. Yes, sir.

Q. I ask you whether or not it is customary in order that all may be advised in addition to the chiefs who are in charge of the Military Police to have the various guarding orders photostated and blown up like this one I have in my right hand here so that everybody will know exactly what the authorities, duties and powers of the Military Police are? I read now from Guard Order No. 1 which is a photostatic replica enlarged four times, of Employer's Exhibit No. 10 and point out to you Article 1. "Pursuant to the orders of the War Department, the guard forces at this plant were activated as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units."

61

A. That is right.

Q. Item 2, "All members of the guard force are subject to the Articles of War and may be court-martialed or otherwise punished for violations thereof." Is that right?

A. Yes, sir.

Q. And I read Article 4: "The mission of this guard force is to provide protection for this plant. In addition to its normal functions, the force or any member thereof, whether on or off duty, is available for military use in any emergency, whether it be the result of flood, fire, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission." I ask you whether that underlined sentence, the last sentence I read, is one which is emphasized in the training and instruction which is accorded to the Military Police?

62

A. Yes, sir.

Mr. Pantzer: I now offer Employer's Exhibits No. 10, 11, and 12 in evidence.

Trial Examiner Shroyer: Is there any objection? If not, they may be admitted.

(Whereupon, the documents heretofore marked for iden-

tification as EMPLOYER'S EXHIBITS 10, 11, and 12 were received in evidence.)

Q. (By Mr. Pantzer.) Are you familiar with the Manual of Interior Guard Duty?

A. Yes, sir, I am.

Q. I show you Field Manual 20-100 issued by the War Department which is called The Basic Field Manual or the Soldier's Handbook, edition of July 23, 1941, and ask you to look at Page 136 and 137 thereof.

A. Yes, sir.

Q. I now show you Employer's Exhibit No. 13 and ask you whether that is a photostatic copy of the face of that basic field manual?

A. Yes, sir.

Q. And pages 136 and 137?

A. Yes, sir, that's it.

Mr. Pantzer: The Employer now offers Employer's Exhibit No. 13 in evidence.

63 (Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 13 was received in evidence.)

Q. (By Mr. Pantzer.) Calling your attention to the almost identical wording of the General Orders of the Military Guard in active military duty and the Auxiliary Military Policemen, as set forth in Employer's Exhibit No. 11—

Trial Examiner Shroyer: Any objections? No objection. It was admitted.

Q. (By Mr. Pantzer.) Referring to Employer's Exhibit No. 11 I call your attention to the third General Order "to report all violations of orders I am instructed to enforce."

A. That's right.

Q. To whom do you report such violations? What do you do under that order?

A. I would report any violation, any serious violation, to Capt. Wetenhall of Cincinnati.

Q. And who instructs you to enforce orders?

A. It would be the government.

Q. Do you take any orders from Mr. Wood who sits here

in the court room and is the personnel director of E. C. Atkins and Company?

A. Yes, naturally, I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken
64 an order as such from him.

Q. You try to cooperate?

A. I try to cooperate to the best of my ability and he does the same for me.

Q. I note that Order No. 10 directs you to salute all officers and all colors and standards not cased. Is it customary for the Military Police to salute the officers of the Army and Navy?

A. Yes, sir. One of our men got a pretty stiff bawling out for failure to do that several months ago and embarrassed me very much.

Q. From whom?

A. Capt. Wetenhall of the army.

Q. He exacts that salute from the men?

A. Yes, sir. And returns it when he receives it.

Q. Is Capt. Wetenhall a regular army man?

A. Yes.

Q. Of the corps of Military Police?

A. Yes, sir.

Q. And CMP stands for Corps Military Police?

A. Yes, sir, it does.

Q. I now show you Employer's Exhibits 14, 15 and 16 and ask you what, if anything, an Auxiliary Military Police stationed at either of the Atkins plants would have to do with those three kinds of cards. The first card is
65 number what?

(Whereupon, the documents above referred to were marked for identification Employer's Exhibits 14, 15 and 16.)

A. Exhibit No. 14, that's a plain, blank for a picture pass and now used in the Armor Plate Division only. A man cannot come in that particular gate and go to work in that building without showing one of these to the guard on duty. That used to be used over the entire plant, the

same blank. But the badges have been finished for the Saw Division and the badge supplanted this card here for the Saw Division, but is still in effect for the Armor Plate Division.

Q. By badge, you mean the cellulcid badge about 2" in diameter with the employee's picture on it?

A. Yes.

Q. Are those badges worn by the production and Maintenance employees?

A. Yes, sir, they are.

Q. Are those badges worn by the Auxiliary Military Police?

A. No, sir, they are not.

Q. The Auxiliary Military Police wear an emblem on the arm, is that right?

A. Yes, sir.

Q. Which says, "Auxiliary Military Police"—on the left arm?

66 Q. The regulation relating to Military Police being the directive that is in evidence; namely, Exhibit 4, is the one that sets forth the way in which those badges are to be worn. Proceed now and tell me what Employer's Exhibit No. 15 is?

A. Exhibit No. 15 is the red pass which passes an employee of the company who is already in the grounds into the Armor Plate Division. For instance, a man may be on maintenance work and not be attached to that department, but he may have to go in there on business. When that happens, the company issues him the red pass which allow him to go in there and take care of whatever business he has but he cannot go in without showing this red pass to the guard on duty at the door of that particular building. What's Exhibit 15.

Q. What is Employer's Exhibit No. 16?

A. Exhibit 16 is a blank which has two uses: (1) One use of which is when it is used as a gate pass which is good to go in and out of the gate at any time during working hours. It is known as a gate pass. It is not issued to anyone going in unless his business in going in and out of the plant necessitates him having it. For instance, an ex-

ecutive of the plant that goes in and out six or eight times a day does so when he is working, so he would have to have one of these to get in and out of the plant. It is used again—the blank is used with different wording typed
67 in as a temporary gate pass to allow a new employee to go to work who has not yet received his regular picture pass or picture badge. In other words, the same blank is used for two different types of passes with different wording thereon. That is Exhibit 16.

Q. Do you know whether or not the Military Police have any grievance procedure such as unions have?

A. Do you mean within the group?

Q. Yes, suppose that someone disciplines one of the men. What recourse does that man have?

A. He has no recourse at all.

Q. Do the members of the Military Police have seniority rights?

A. No, sir.

Q. What is the fact on that case?

A. Well—

Trial Examiner Shroyer: In regard to lay offs?

Q. (By Mr. Pantzer.) With respect to lay offs, promotions, and so forth?

A. Of course, we haven't had any lay offs but there naturally would be no seniority, entering that I would not think. But in the matter of promotions, efficiency and ability is the only factor that governs. We have men working with us that have been there lots longer than any of our lieutenants at the present time, but the lieutenants
68 who are there, the last three lieutenants that are promoted, but the three lieutenants are not in any respect the oldest guards in the point of seniority. They happen to have been of extra ability, judgment, other qualities.

Q. Upon being promoted to lieutenant, do they obtain greater pay?

A. Yes, sir.

Q. The question of their length of service would be at the Atkins plant and is no criterion whatever?

A. Wouldn't be accepted in the slightest regard, no, sir.

Q. Now, Mr. Gann, when he was on the stand, referred to general orders, which, I take it, are Employer's Exhibits

10, 11, and 12 that I entered into evidence while you were on the stand, Mr. Witness, and also two special orders. What are the special orders?

A. Well, the best way I can describe a special order—most special orders would come from myself.

Q. Are they verbal or written?

A. Well, they are both. Small special orders, nevertheless important enough to be adhered to would be verbal, but a special order which would be a little more complicated or something of that nature would be written down and nailed on the bulletin board in the guards' room and they would read it and follow it.

Q. Do any of the Military Police under your com-
69 mand take any orders from any officer, director, or agent of the Atkins company as such?

A. No, they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

A. They would—that would be their orders—to follow mine, yes, sir.

Q. You would have the same reaction towards such request of cooperation as you would if you had a specific order or a general order to the contrary from one of these superiors, is that right?

A. Yes, sir. In those orders, it says, "No conflicting interest." It means a little different thing there but it means a lot besides. You would follow your Governmental orders first. They would have a much higher priority.

Q. Do you, when you first go on duty, have a formation of any kind, an inspection, a roll call?

A. Not a formal one, no, sir. It would be most informal in our plant. With just nine men you can see who is there at a glance. You wouldn't have to call roll. Inspection is just as quickly done.

Q. Are those guards, when they perform their duty, armed?

70 A. Yes, sir.

Q. With what weapon?

A. With a revolver.

• • • • •

73 Q. What would you do if you found Mr. Wood tampering with machinery or personnel or committing sabotage?

A. Well, in a case like that, I would just turn him
74 in, like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

Q. Would you do the same with the president of the company?

A. Yes, sir, I would.

Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

A. No, sir, there is no reason for that.

Q. You have stated that your pay is on a weekly basis?

A. Yes, sir.

Q. And that consequently you get no overtime for any special service?

A. No, sir.

Q. In that respect you are like a soldier paid on a monthly basis?

A. Yes, sir.

Q. Officer paid on a monthly basis?

A. Yes, sir.

Mr. Pantzer: I think that is all.

Trial Examiner Shroyer: I don't know whether we had 14, 15, and 16 admitted?

Mr. Pantzer: I beg your pardon. I wish to offer 14, 15, and 16.

Trial Examiner Shroyer: Any objection? If not, they are admitted.

• • • • •

75 *Cross-Examination.*

Q. (By Mr. Richardson.) You are the Chief of the Guards?

A. Yes, sir, I am.

Q. In other words, all guards come under your direction?

A. Yes, sir.

Q. You have the right to give them orders? You do give them orders, don't you?

A. Yes, sir, I do.

Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging.

Trial Examiner Shroyer: Who issues these two different types of terminations?

76 The Witness: He does, he issues those.

Trial Examiner Shroyer: Pardon me.

Mr. Richardson: That's all right.

Q. (By Mr. Richardson.) Suppose Mr. Atkins came out and gave you an order. Would you obey that?

A. I never got an order.

Q. If you did, would you obey that order?

A. Well, I wouldn't consider it an order, in the first place. If I could oblige him in any way, without violating federal orders, I would do my best to cooperate with him, but I wouldn't have an order from him in the first place.

Q. Are you paid by check?

A. Yes, sir.

Q. Who signs the check?

A. E. C. Atkins and Company.

Q. What do you mean you are hired by the Government when E. C. Atkins and Company pays you?

A. They pay because the Government makes them pay me.

Q. Have you got any commission in the army?

A. No, not with the Government.

Mr. Richardson: That's all.

Examination by Trial Examiner.

Q. (By Trial Examiner Shroyer.) These four lieutenants—who made them lieutenants?

A. I made three of them myself. One of them was a
77 lieutenant when I came there. He is a very fine man. His work has been satisfactory and I saw no reason to change it.

Q. Whom did you confer with?

A. No one.

Q. You have final authority to do that?

A. Yes, sir.

Q. Without going either through the personnel office or through the Auxiliary Military Police departments?

A. The only thing I did was after I had decided who would be the next lieutenant and furthered that man, made him a lieutenant, myself, in my office, gave him his gold badge and his authority and posted the notice that he was a lieutenant, and then I went to Personnel and advised them that he was the new lieutenant.

Q. He got his increase in pay?

A. Yes.

Q. Who made you the Chief?

A. I don't know. I was hired just like a regular guard with the idea that I would be Chief and after a certain length of time, I became Chief at the Okey of the army and the company.

Q. You are hired at the personnel office to be Chief subject to the approval of the Government?

A. Yes, sir.

78 And of course I am inspected by the army and if they don't like me as being Chief, they can "un-chief" me very fast.

Q. Are all your guards militarized?

A. All but two or three that are brand new men and will be in a week or so.

Trial Examiner Shroyer: That's all.

Redirect Examination.

Q. (By Mr. Pantzer.) In connection with your administrative duties, do you carry on any correspondence with Mr. Wood or any officials of the plant?

A. No, sir.

Q. Do you carry on any correspondence with the Cincinnati office of the Military Police?

A. Yes, sir.

Q. With Captain Wetenhall?

A. Wetenhall's office.

Q. Do you have before you there the file of that correspondence?

A. Yes, sir, I think it is here.

Q. And that file is about one inch thick now?

A. Yes, sir.

Q. And contains onion skin carbon copies of your letters to Wetenhall and original letters from Wetenhall to you?

A. That's right.

Q. About how often do you write him affecting your duties, responsibilities, and requests for instructions from him?

79

A. On an average probably of twice a week, is all.

Q. You ask him both for general orders and for specific instructions?

A. Yes, or I might on a small case instead of writing Capt. Wetenhall, I might talk it over with his assistant, Lt. Scanlon in the City of Indianapolis, who lives here.

Q. That wouldn't require correspondence?

A. No.

Q. You could conduct by telephone too?

A. Yes.

Q. Will you glance through that file and let us know what type of questions you have on occasion taken up with Capt. Wetenhall?

A. Most of these are about men being discharged or hired.

Q. With respect to hiring and discharging?

A. Yes. Asking him for passes to be sent to me that I can have the finger prints and the facts printed in and

things of that nature. Do you want me to read one of these letters?

Q. Yes, if you have a characteristic letter.

A. "Continuous Security District, P. O. Box 1750, Cincinnati, Ohio. Attention: Capt. Wetenhall. Gentlemen: Attached you will find two guards' passes of which the one on Carl Taber is to be cancelled with an honorable
80 discharge. You will note on the second one, which is made out on Garnet J. Williams, that it has not been signed by you. Evidently that was overlooked, so I will appreciate it if you will sign Williams' pass and return it to me. Yours very truly, Henry A. Johnston, Chief of Guards, E. C. Atkins and Company."

Q. If a man is drunk on duty have you the right to discharge that man?

A. I couldn't discharge him legally, no, sir.

Q. Could you suspend him?

A. I would merely suspend him from duty as of the minute I saw him in that condition.

Q. What would be your next step?

A. To sit down and write Capt. Wetenhall a letter and I would recommend his discharge from the Military Police.

Q. Do you recommend discharge to Mr. Wood of the Personnel office?

A. I follow through on that so that the same record—the record will be set straight.

Q. Which one discharges?

A. The Government does the discharging from the Military Police.

Q. Mr. Wood couldn't discharge the man, could he, under these regulations?

A. Not under those regulations.

* * * * *

82 Q. You have been in actually?

A. Have since 1937.

Q. About the time that the CIO organized the production workers, exclusive of saw smiths?

A. That's right.

Q. What two unions do you have at your plant?

A. We have the saw smiths' local union affiliated with

A. F. of L. and U. S. A. Local affiliated with United States Saw Smith Workers of America.

Q. I am going to refer to them as the Saw Smiths' Local and the CIO.

How many employees have you in the Saw Smiths' Local at the present time?

A. 59.

Q. Now there are 59 saw smiths, is that right?

A. That's right.

Q. Do the apprentices to saw smiths attain active membership in the Saw Smiths' Local?

A. No.

Q. Do the brake press operators, which in a sense, do some of the work that the saw smiths do, attain active membership in that Local?

A. No, sir.

Q. But neither the apprentices to saw smiths nor the brake press operators are members of the CIO?

83 A. That's right.

Q. How many of your employees are members of the CIO?

A. As near as I can tell you now, about 1,208.

Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

A. Thirty-two.

Q. When you say your employees, they are your employees only in the sense that you pay their wages, is that right?

A. That is correct.

Q. And you make the necessary pay roll deductions?

A. That's right.

Q. How many of those Auxiliary Military Police are stationed at the Fall Creek Ordnance Plant?

A. Thirty.

Q. Now then, have you mentioned now all the persons, the individuals who are occupied either in production work or as Auxiliary Military Police at both those plants?

A. That is correct.

Q. Is the Saw Smiths' Union a closed shop?

A. Yes, it is.
Q. Is the CIO a closed shop union?
A. It's a union shop.
Q. And substantially all the production workers do belong to that?
A. That's correct.
84 Q. All of them?
A. Yes.
Q. Now then, state who is the owner of the plant and improvements at your main plant?
A. E. C. Atkins and Company.
Q. Who is the owner of the land, improvements, machinery, and fixtures at the Fall Creek Ordnance plant?
A. The United States Government.
Q. State in what capacity E. C. Atkins and Company operates that plant?
A. The plant is operated upon a lease.
Q. Lease from the Federal Government?
A. That's correct.
Q. And the terms and conditions of that lease are confidential for military reasons?
A. That is correct.
Q. So that it would be a breach of military confidence to introduce that lease in evidence?
A. That's right.
Mr. Pantzer: We beg, therefore, Mr. Examiner, to be relieved of what would be by me the obligation of producing that lease in evidence and advising what its terms are.
Trial Examiner Shroyer: Surely.
Q. (By Mr. Pantzer.) Is the Fall Creek Ordnance Plant treated by the E. C. Atkins Company in the
85 light of a military reserve?
A. It is.
Q. And is it so treated by the military authorities?
A. It is.
Q. That is not the case with the main plant on Illinois Street?
A. No, sir.
Q. That is a plant which belongs to the Atkins company?

A. That is right. It is listed, however, as a restricted area under government supervision.

Q. I now show you Employer's Exhibit No. 17 and ask you whether that is a photostatic copy of the existing contract between E. C. Atkins and Company and the CIO Local?

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit No. 17.)

A. This is a contract that is now in force, yes.

Mr. Pantzer: I offer Employer's Exhibit No. 17 in evidence.

Trial Examiner Shroyer: Is there any objection?

Mr. Richardson: No.

Trial Examiner Shroyer: There being no objection, it may be admitted.

(Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 17 was received in evidence.)

86 Q. I show you Employer's Exhibits No. 18, 19, and 20 and ask you what they are?

(Whereupon, the documents above referred to were marked for identification as Employer's Exhibits No. 18, 19, and 20.)

A. Exhibit No. 18 is our original agreement negotiated as of July, 1940 with the Saw Smiths' Local Union No. 18548, affiliated with the A. F. of L. Exhibit No. 19 is an addendum to the original agreement of July, 1940, entered into between the Saw Smiths' Union and E. C. Atkins and Company to allow the use of other than anvil men on brake presses to straighten armor plate to expedite production of government orders. No. 20 is an addendum that was drawn up at the time of the discussion in regards to the use of brake press operators and shows a period of time over which an experiment was carried out to see whether we could produce the required amount of armor plate without the addition of brake press operators.

Trial Examiner Shroyer: May I ask if the company has any quarrel with the inclusion of the two plants by the union in one unit or whether or not it all goes to the main shops?

Mr. Pantzer: It all goes to the main shops. I want to say this in answer to your question, that at a representation hearing at which both the CIO Local and the Saw Smiths' Local are parties and represented held in
87 January 1 hearing, lasting for four days, the company took the position that the employees of both the main plant and the Fall Creek Ordnance Plant belong to one bargaining unit, a position which was sustained by the Board.

Trial Examiner Shroyer: And the contracts so written?

Mr. Pantzer: The contracts were so written. It would be out position that if the employer is wrong on its main contention, that the National Labor Relations Board does not provide for bargaining between what you might call almost an independent contractor and a labor union, that the employees of both plants belong to one bargaining union. I understand that was also Mr. Richardson's position taken in the very amicable conference we had before Mr. Getreu, the field examiner at the Indianapolis office. That is right, Mr. Richardson?

Mr. Richardson: That is right.

Trial Examiner Shroyer: I didn't want to interrupt you.

Mr. Pantzer: I surely think we should get it in the record.

Trial Examiner Shroyer: Thank you.

Mr. Pantzer: I offer Employer's Exhibits No. 18, 19, and 20.

Trial Examiner Shroyer: If there is no objection, they may be admitted into evidence as Exhibits No. 18, 19, and 20.

* * * * *

91 Q. Those two sets of contracts that I gave you provide for seniority in the case of your regular production-maintenance employees, do they not?

A. That's correct.

Q. And are those rules respecting seniority enforced as to those employees?

A. Oh, yes.

Q. Are they enforced by you with respect to the Auxiliary Military Police?

A. No.

Q. Does the same apply with respect to grievance procedure?

In other words, the grievance procedure is not a part of the discipline of the Auxiliary Military Police? They have their own discipline?

A. That's right.

92 Q. What would you do, Mr. Witness, if one of the Auxiliary Military Police came to you and protested to any action of a disciplinary nature by Chief Johnston?

A. Report that to the proper authorities, in this case to Col. Rasmussen in Cincinnati. He is the man that my office deals with when necessary.

Q. You would take no jurisdiction yourself?

A. No, not without instructions from Col. Rasmussen.

Q. You do, whenever matters of discipline are taken up in your plant get confirmation of any instructions which Col. Rasmussen or Capt. Wetenhall sent to Chief Johnston or to Chief Hann, is that right?

A. That's right.

Q. Do you give any military instruction to your regular employees at the Atkins company?

A. No.

Q. Are they required to salute?

A. No, sir.

Q. Who has the right to discharge the employees?

A. Plant employees?

Q. Plant employees.

A. I do.

Q. You and the foremen?

A. The foremen can recommend the discharge. The actual discharge has to take place through the gen-

93 eral superintendent or myself.

Q. In the CIO contract?

A. Yes, sir. That's right.

Q. I ask you whether anyone other than Auxiliary Military Police down at your plant is entitled to carry an identification card such as is set forth on Employer's Exhibit No. 3?

A. No, only the Auxiliary Military Police are issued these cards.

Q. Are they issued by your office?

A. They are not. They are issued by the Cincinnati office.

Q. With respect to the production employees and the officers, directors and other agents of E. C. Atkins and Company, what kind of an identification card is issued?

A. We have small cards, a card that was early requested by the Ordnance Division to carry a man's photograph, his thumb prints, and a description, a general description.

Q. I show you Employer's Exhibit No. 21 and ask you whether that is a photostatic enlargement of this, your own card?

A. That is correct.

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit No. 21.)

Mr. Pantzer: I offer Employer's Exhibit No. 21 in evidence.

Trial Examiner Shroyer: If there is no objection, it
94 may be admitted.

(Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT 21, was received in evidence.)

Q. (By Mr. Pantzer.) In addition to the identification card, Employer's Exhibit No. 21, do you and all the other officers, directors and production and maintenance employees of the Atkins company wear identification badges?

A. We do.

Q. About 2" in diameter with your photograph on them?

A. 2" in diameter at the South Street plant and 1½" in the Fall Creek.

• • • • •

95 Q. When they have been recommended, do you know whether or not the military authorities make an independent investigation as to the capacity, integrity, and patriotism of the man whom you have recommended?

A. In the past two years, it has come to my attention, for no statement has been made, that they do, but the re-

port has come back which made it necessary to remove a man on the force.

Q. Is that so that you are satisfied that an independent investigation is made?

A. That's correct.

Q. In addition to what you have learned in the court room today from Chief Johnston?

A. Yes.

98 Trial Examiner Shroyer: That is right.

I believe you also stated at the beginning of the hearing that you wish to renew your motion to dismiss at this time? Do you care to make any additional statement?

Mr. Pantzer: No. May I just by so saying renew that motion without repeating the language—the motion to dismiss which I made at the beginning of the hearing?

Trial Examiner Shroyer: I will allow that and I will refer the motion to the Board.

Is there anything further coming before the Trial Examiner? If there is nothing further, the hearing is closed.

(Whereupon at 5:00 p. m., the hearing was closed.)

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

Ninth Region.

In the Matter of:
E. C. Atkins and Company
and
International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated with the American Federation of Labor.
} Case No. 9-C-1982.

Room Number 216.
Federal Building,
Indianapolis, Indiana.
Monday, January 31, 1944.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m., c.w.t.

Before:

Charles E. Persons, Trial Examiner.

Appearances:

Messrs. Thomas E. Shroyer, and Allen Sinsheimer, Jr., for the National Labor Relations Board, 443 U. S. P. O. and Court House, Cincinnati, Ohio.

Messrs. Kurt F. Pantzer, and Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana, Appearing on behalf of the Respondent.

Messrs. F. M. Richardson, Business Agent, Carl Cedarquist, Grand Lodge Representative, William
2 J. Layton, Business Agent, 49½ South Delaware Street, Indianapolis, Indiana; and

Mr. Van B. Carter, Business Agent, International Association of Machinists, Broadway Hotel, Cincinnati, Ohio,

All appearing on behalf of the International Association of Machinists, District Number 90, and their affiliate Local Lodge 1683.

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4 PROCEEDINGS.

Trial Examiner Persons: This is a formal hearing before the National Labor Relations Board in the matter of E. C. Atkins and Company and International Association of Machinists, District 50 and their affiliate Local 1683, also affiliated with the American Federation of Labor. The case is known in the Board's system of numbering as Number 9-C-1982.

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11 Mr. Pantzer: May I be permitted to interrupt Mr. Sinsheimer in order to present to the Trial Examiner the original copy of an application for subpoena duces tecum directed at Mr. S. M. Richardson, to produce certain union records, a copy of which I have left with Mr. Sinsheimer, and another copy of which I have left with the representatives of the union over here (indicating) at the Union table.

Is your Honor prepared to rule upon the application for subpoena duces tecum at this time?

12 Trial Examiner Persons: Upon first examination, Mr. Pantzer, it appears to me that this subpoena duces tecum is aimed at things which naturally come up in "R" proceedings. Now, I understand we have already had the "R" proceedings in this particular case—am I correct in that?

Mr. Pantzer: Yes, we have had the "R" proceedings.

Mr. Sinsheimer: I would like it to be noted in the record that the Board is objecting to all matters called for in the subpoena duces tecum excepting the Charter and By-laws of the Union and as to those I do not know whether Mr. Pantzer wants those produced or not.

Mr. Pantzer: Well, if the Charter, Constitution and By-laws, as produced at the representation case, may be considered as being in evidence in this case, which I take it will be so stated in the stipulation which Mr. Sinsheimer and I are about to enter, in this case, then there is no need to have a subpoena duces tecum directed at further production of those particular documents and I hereby with-

draw, for the purposes of this record, Item Number 1 of the application just handed to the Trial Examiner entitled "Charter, Constitution and By-laws of the Union".

Mr. Sinsheimer: We will agree that they will be introduced, or agree that they are in this hearing.

Trial Examiner Persons: Were they made a part of the record of the previous proceedings?

13 Mr. Sinsheimer: That is correct.

Trial Examiner Persons: Well, in the event these proceedings should find their way into the Circuit Court, they would become, by the language of the Act itself, a part of the record there.

Mr. Pantzer: That is right.

Mr. Sinsheimer: As to the other matters called for in the subpoena duces tecum, the Board is objecting to.

Mr. Pantzer: May I, Mr. Examiner, have the application marked Respondent's Exhibit Number 1 for the purpose of identification—I am wondering, in order to avoid confusion with the record in the previous case, whether or not we might be permitted to number our exhibits in this case alphabetically, because I do anticipate this case will go to the Circuit Court and it will avoid a great deal of confusion in the matter of like-numbered exhibits?

Trial Examiner Persons: May I ask if a similar request was presented in the "R" proceeding?

Mr. Pantzer: Yes, a similar request was made in the "R" proceeding—the chief difference between the "R" proceedings and this proceeding being the inclusion of the collective bargaining agreements and copies of the grievances and seniority lists referred to in the request and the inclusion of the request and the inclusion of Paragraph F of the reasons for the requests in the present

14 document, those items not having appeared in the application which was submitted in the representation case.

Trial Examiner Persons: The request of the respondent as to the numbering of those exhibits will be at this time denied. I think it might well be a part of the record, but we cannot interfere with the official reporter's instructions as to how these exhibits shall be numbered. That is covered, is it not, Mr. Hise, by your instructions?

The Reporter: Yes, your Honor.

Trial Examiner Persons: It is stipulated between the parties to avoid confusion between the numbering of exhibits in this "C" proceedings and those exhibits previously numbered in the "R" proceeding—that the numbering of the exhibits in the case of both these respondents and the Board, will start with number 100—

Mr. Pantzer: With 101, if you please, sir.

Trial Examiner Persons: Yes, number 101—do you so agree?

Mr. Sinsheimer: We agree to that.

Mr. Pantzer: And we do too. Thank you, your Honor.

(Thereupon, the document above referred to was marked RESPONDENT'S EXHIBIT NO. 101 for identification and received in evidence.)

• • • • •

24 Mr. Sinsheimer: The Board would like to say this: That the Board does not intend to limit its proof of the facts as to whether or not these are employees, to those eight or nine pages which have just been stipulated to be a part of the record, but the entire testimony at that hearing goes to the question of whether they are, or are not employees of the Respondent.

The Board only—the Board primarily introduced those eight pages for the purpose of establishing the fact that the Union is a labor organization within the meaning of the Act.

Trial Examiner Persons: Thank you, Mr. Pantzer, for your very clear statement.

25 Am I right in understanding that the parties propose to rest upon the testimony presented in the previous "R" proceeding, on this particular issue?

Mr. Sinsheimer: The Board does.

Mr. Pantzer: Yes, we do too.

Trial Examiner Persons: Thank you, gentlemen.

Mr. Pantzer: We should have liked to introduce the additional evidence requested upon the subpoena duces tecum on this point because I can conceive that it has a direct bearing with respect to this union, on the kind of employees which are the plant guards in the E. C. Atkins and Company, but in the absence of that kind of testimony

we shall have to be bound by the record in the preceding case.

Certainly we have no further testimony to offer on the subject.

* * * * *

27 Mr. Sinsheimer: I now offer for identification as Board's Exhibit Number 102, a copy of a proposed agreement between E. C. Atkins and Company, Indianapolis, Indiana, and the International Association of Machinists, District 90, and its affiliated Local Lodge Number 1683.

(Thereupon the document above referred to was marked Board's Exhibit No. 102 for identification.)

28 Mr. Sinsheimer: I would like to call attention at this time to the fact that there is some handwriting on the upper righthand corner of the first page of this document, reading "Exhibit D" which should be crossed off the exhibit as having no relationship to this matter.

Mr. Pantzer: Let the reporter so cross it off?

Trial Examiner Persons: That may be done.

(The reporter complied with instructions of Trial Examiner.)

Trial Examiner Persons: Is that satisfactory to you, Mr. Pantzer?

Mr. Pantzer: I wish to say again, that I can have no objection to this Board's Exhibit Number 102 on the basis of authenticity, or that it was received.

My objection to the introduction of this exhibit in evidence is predicated, of course, upon the Trial Examiner's refusal to grant me the application for a subpoena duces tecum which would have shown, I submit, in the collective bargaining agreement which this Local has with other plants in this town—would have adduced in evidence that certain of the demands in this Board's Exhibit Number 102 were changed by the processes of collective bargaining and that some of them were not; and the extent to which those demands, those demands which were not so changed by collective bargaining, were incompatible with the

29 best interests of the military service.

Trial Examiner Persons: I take it when you say "they were changed" you mean in the other plants that

similar agreements were presented and in process of collective bargaining that they were modified?

Mr. Pantzer: Yes. Now, where you say "were modified", I cannot, of course, say as to that. I assume that bargaining would have had some effect upon the demands and that it certainly would not have been signed verbatim by any employer. I have had no means of finding out wherein those demands were changed in the processes of collective bargaining.

Now, that is my only objection, Mr. Examiner. My objection is not directed to the authenticity of the paper, nor to the fact that it was received.

• • • • •

RESPONDENT EXHIBIT NO. 1.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683, *Petitioner.*	Case No. 9-R-1200.

APPLICATION FOR SUBPOENA DUCES TECUM DIRECTED AT F. M. RICHARDSON TO PRODUCE UNION RECORDS.

Comes now E. C. Atkins and Company, one of the parties to this proceeding, and respectfully applies for a subpoena *duces tecum* directed at F. M. Richardson, Business Representative, International Association of Machinists, District 90, and their affiliate, Local 1683 (hereinafter referred to as the "Union"), one of the parties to this proceeding, to produce the following documents:

1. Charter, Constitution and By-laws of the Union;

2. Minute book, membership roll, application cards, membership cards, dues books, bank book, check book, cancelled checks, correspondence and other records relating to the purposes, activities and membership of said Union; in order that E. C. Atkins and Company may establish (a) the identity of the Union, within the purview of Section 2, subsection (5) of the National Labor Relations Act; (b) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," are "employees" within the purview of Section 2, subsection (3) of the National Labor Relations Act; (c) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," within the purview of Section 7 of the National Labor Relations Act; (d) whether it is an unfair labor practice for E. C. Atkins and Company "to refuse to bargain collectively with the representatives of "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," within the purview of Section 8, subsection (5) of the National Labor Relations Act; and (e) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," can properly be found to be a "unit appropriate for the purposes of collective bargaining," within the purview of Section 9, subsection (b) of the National Labor Relations Act.

E. C. ATKINS AND COMPANY,
By Kurt F. Pantzer,
Attorney.

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS

AUXILIARY MILITARY POLICE

ARMY OF THE UNITED STATES

IN THE MATTER OF

WITN

Certificate of Enrollment

FULL E. FISHER

This is to Certify that Henry Alma Johnston

has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of _____, for service with the Army of the United States at R. C. Hickox & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.

For the Commanding General Fifth Service Command

Dated 29 June 1943

E. R. WETENHALL
Lt. C. M. P.
District Field Grade Officer
Civil Service Bldg., Cincinnati, O.

PLACE GRADE OFFICER

143

RESPONDENT EXHIBIT NO. 8.

Cincinnati Office

Aye Eldridge is hereby released from the obligations assumed upon signing agreement as a Civilian Auxiliary to the Military Police at the Fall Creek Ordnance Plant, Indianapolis, Indiana.

By order of the Chief, Cincinnati District Continuous Security Branch.

20 September 1943.

B. R. WETENHALL,
B. R. Wetenhall,
Captain—C. M. P.,
District Plant,
Guard Officer.

THE ARTICLES OF WAR

Appendix 1
TO
A MANUAL
FOR
COURTS-MARTIAL
U. S. ARMY

1928

NATIONAL LABOR RELATIONS BOARD
CASE NO. 2-R-1200 { BOARD / PETITIONER / RESPONDENT } EXHIBIT NO. 9
IN THE MATTER OF E. S. Wilkins & Co
DATE 9-27-43 WITNESS Johnston
ETHEL E. FISHER, OFFICIAL REPORTER
BY [illegible]

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1942

150
170

THE ARTICLES OF WAR

Appendix I

TO

A MANUAL

FOR

COURTS-MARTIAL

U. S. ARMY

1920

Art. 2. Persons Subject to Military Law.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: Provided, That nothing contained in this act, except as specifically provided in article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts-martial;

(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

• • • • •

F. Punishments.

Art. 41. Cruel and Unusual Punishments Prohibited.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited.

Art. 42. Places of Confinement—When Lawful.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also the period of confinement authorized and adjudged by such court-martial is more than one year: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: Provided further, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: Provided further, That persons sentenced to dishonorable discharge and to confinement, not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary.

Art. 43. Death Sentence—When Lawful.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years,

except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

* * * * *

B. Desertion; Absence Without Leave.

Art. 58. Desertion.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be recommitted in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

* * * * *

Art. 61. Absence Without Leave.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

C. Disrespect; Insubordination; Mutiny.

Art. 62. Disrespect Toward the President, Vice President, Congress, Secretary of War, Governors, Legislatures.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

Art. 63. Disrespect Toward Superior Officer.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

Art. 64. Assaulting or Wilfully Disobeying Superior Officer.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

Art. 65. Insubordinate Conduct Toward Noncommissioned Officer.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a non-commissioned officer while in the execution of his office, or uses threatening or insulting language or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

* * * * *

Art. 68. Quarrels; Frays; Disorders.—All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court martial may direct.

D. Arrest; Confinement.

Art. 69. Arrest or Confinement.—Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily

be placed in confinement. Any person placed in arrest under the provisions of this article, shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct.

* * * * *

F. Miscellaneous Crimes and Offenses.

* * * * *

Art. 85. Drunk on Duty.—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty, shall be punished as a court-martial may direct.

Art. 86. Misbehavior of Sentinel.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

* * * * *

Art. 90. Provoking Speeches or Gestures.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

* * * * *

Art. 92. Murder—Rape.—Any person subject to mili-

tary law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Art. 93. Various Crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

* * * * *

V. Miscellaneous Provisions.

Art. 104. Disciplinary Powers of Commanding Officers.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges for not exceeding one week, extra fatigue for not exceeding one week, restriction to certain specified limits for not exceeding one week, and hard labor without confinement for not exceeding one week, but shall not include forfeiture of pay or confinement under guard; except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article, also impose upon an officer of his command below the grade of a major a forfeiture of not more than one-half of such officer's monthly pay for one month. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in

the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

Art. 105. Injuries to Property—Redress of.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

* * * * *

RESPONDENT EXHIBIT NO. 10.

WAR DEPARTMENT
CONTINUOUS SECURITY DISTRICT OFFICE
904 Enquirer Building
Cincinnati, Ohio

10 May 1943

Guard Order)
No. 1)

To: Auxiliary Military Police of this Plant.

1. Pursuant to the orders of the War Department, the guard forces at this plant were activated as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

2. All members of the guard force are subject to the Articles of War and may be court-martialed or otherwise punished for violations thereof.

3. A commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military Police.

4. The mission of this guard force is to provide protection for this plant. In addition to its normal functions, the force or any member thereof, whether on or off duty, is available for military use in any emergency, whether it be the result of flood, fire, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.

5. The Government of the United States regards the protection of this plan and its production as essential in the successful prosecution of the war. The Auxiliary Military Police are ordered to provide this necessary protection and to ward off danger or threat of danger of any kind and from any source. If force must be used to ac-

complish this result, it will be used only to the extent reasonably necessary.

6. No member of the Auxiliary Military Police may resign without the written approval of the District Plant Guard Officer. Inattention to duty, failure to attend required instruction periods, and conduct unbecoming to the service may be cause for dismissal and the denial of a Certificate of Meritorious conduct.

For the Commanding Officer:

B. R. Wetenhall
Captain, C. M. P.
District Plant Guard Officer.

Approved,
Signed .....
Name in Type
Title
Plant

CIPP 68

Production Must Not Be Interrupted

RESPONDENT EXHIBIT NO. 11.

WAR DEPARTMENT
CONTINUOUS SECURITY DISTRICT OFFICE
904 Enquirer Building
Cincinnati, Ohio

11 May 1943

Guard Order)
No. 2)

1. General Orders. General Orders are those orders which apply to all posts. All Auxiliary Military Police members of plant guard forces are required to thoroughly understand the following listed General Orders.

2. When directed by proper authority to recite his General Orders a member of the Auxiliary Military Police replies substantially as follows:

My General Orders are:

(1) To take charge of this post and all plant and government property in view.

(2) To walk my post in a military manner, keeping always on the alert and observing everything that takes place within sight or hearing.

(3) To report all violations of orders I am instructed to enforce.

(4) To repeat all calls from posts more distant from the guardhouse than my own.

(5) To quit my post only when properly relieved.

(6) To receive, obey, and pass onto the guard who relieves me all orders from the plant official in charge of the Plant Guard Force, the Chief and non-commissioned officers of the guard.

(7) To talk to no one except in the line of duty.

(8) To give the alarm in case of fire or disorder.

(9) To call the Chief of the Guard in any case not covered by instructions.

(10) To salute all officers and all colors and standards not cased.

(11) To be especially watchful at night and during the time for challenging to challenge all persons on or near my post, and to allow no one to pass without proper authority.

(12) To allow no one to commit a nuisance on or near my post.

(13) To allow no one to enter upon plant property without proper authority.

(14) To detain all persons attempting to take photographs or make maps or sketches of the plant property without proper authority.

(15) To give no information concerning the plant or its business to anyone.

(16) To give first aid where necessary, and to direct injured persons, who can walk, to aid stations.

(17) To assist authorized persons to locate an area or gate or office to which they have been directed by proper authority.

(18) To allow no one to loiter on or near my post or the plant premises, and to detain all suspicious persons and call the Chief of the Guard.

By order of the Commanding Officer:

B. R. Wetenhall
Capt., C. M. P.
District Plant Guard Officer

Approved,
Signed .....
Type Name—
Title
Plant

CIPP 52

Production Must Not Be Interrupted

RESPONDENT EXHIBIT NO. 12

(Letterhead of Continuous Security District Office, Cincinnati, Ohio.)

12 May 1943.

Guard Order
No. 3

To All Auxiliary Military Police

1. Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six (6) months of service faithfully performed.

2. Service will begin with the date that the plant guard was inducted into the Auxiliary Military Police.

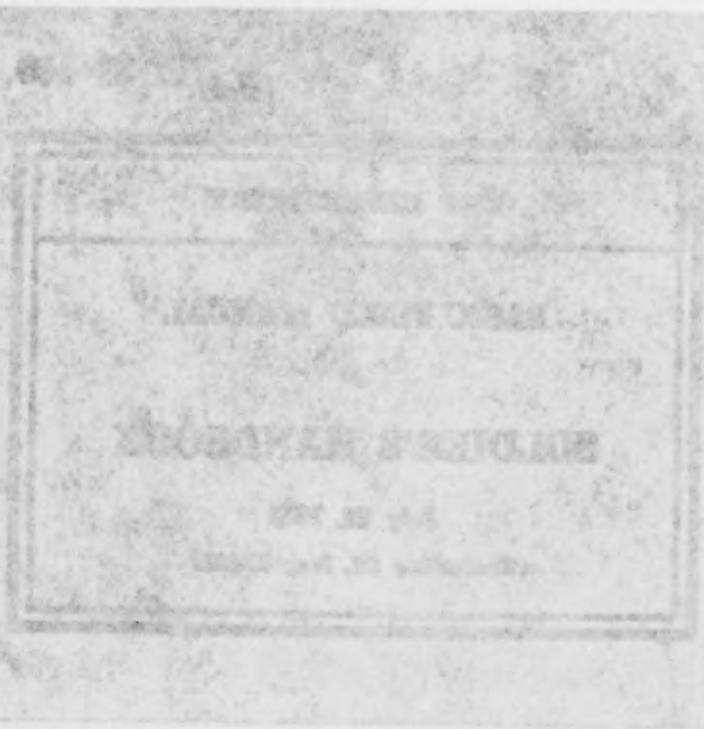
3. The service stripe will be in accordance with Army Regulations and will conform in material and color to the chevrons authorized to be worn by the Auxiliary Military Police in the Fifth Service Command.

4. The service stripe will not be furnished at government expense.

For the Commanding Officer:

B. R. Wetenhall,
Capt., CMP
District Plant Guard Officer.

Approved,
Signed Harold L. Schuman.
Type Name
Title
Plant



RESPONDENT EXHIBIT NO. 13.

190. While you are off duty do not remove your clothing or equipment or leave the immediate vicinity of the guardhouse without permission of the commander of the guard. An emergency may occur when you will be needed at once.

191. When you are not posted as a sentinel or on other duty which requires you to carry your rifle, keep it in the arms rack in the guardhouse or in a stack.

192. Orders for sentinels are of two classes: general orders and special orders. *General orders* apply to all sentinels. *Special orders* apply to particular posts and duties. You must know and be able to recite the general orders before you go on guard duty. As soon as you are assigned to a relief and a particular post you must also learn and be able to recite the special orders for that post. Whenever the officer of the day or the commander of the guard considers that a sentinel does not have sufficient instruction or is otherwise unfit for guard duty, he relieves him, sends him back to his organization, and notifies his organization commander.

193. The following are the general orders all sentinels are required to memorize. Learn them as soon as you can.

My general orders are—

1. *To take charge of this post and all Government property in view.*

2. *To walk my post in a military manner, keeping always on the alert and observing everything that takes place within sight or hearing.*

3. *To report all violations of orders I am instructed to enforce.*

4. *To repeat all calls from posts more distant from the guardhouse than my own.*

5. *To quit my post only when properly relieved.*

6. *To receive, obey, and pass on to the sentinel who relieves me all orders from the commanding officer, officer*

of the day, and officers and noncommissioned officers of the guard only.

7. *To talk to no one except in line of duty.*

8. *To give the alarm in case of fire or disorder.*

9. *To call the corporal of the guard in any case not covered by instructions.*

10. *To salute all officers and all colors and standards not cased.*

11. *To be especially watchful at night and, during the time for challenging, to challenge all persons on or near my post, and to allow no one to pass without proper authority.*

194. Guard duty is one of your most important duties. Remember that when you are posted as a sentinel you represent the commanding officer whose orders you are required to enforce, on and in the vicinity of your post. Upon the manner in which you perform your duties depends not only the enforcement of military law and orders, but also the security of persons and property under your charge. In time of war your responsibility as a member of the guard is greater than ever, for then the safety of your organization depends upon the manner in which you watch while your comrades rest. This is so important that sleeping on post by a sentinel or other improper performances of duty is punishable by a very severe court-martial sentence.

RESPONDENT EXHIBIT NO. 17.

Exhibit A.

Collective Bargaining Agreement
Executed by and Between

E. C. Atkins and Company

and

United Steelworkers of America, Local No. 1543
Affiliated with the C. I. O.

This Agreement, Dated and effective June 14, 1943, but actually executed June 14, 1943, by and between E. C. Atkins and Company, an Indiana corporation (hereinafter referred to as the "Employer"), Party of the First Part, and United Steelworkers of America, Local No. 1543, Affiliated with the C. I. O. (hereinafter referred to as the "Union"), Party of the Second Part,

Witnesseth That:

Whereas, the Employer and the Union have negotiated the terms and conditions of a Collective Bargaining Agreement, and desire to reduce the same to writing:

Now, Therefore, The parties hereto enter into the following Articles of Agreement:

Section 1—Bargaining Unit, Recognition and Co-operation

(a) Bargaining Unit. It is hereby agreed that the unit appropriate for the purposes of collective bargaining, pursuant to the provisions of Section 9 (b) of the National Labor Relations Act, is the unit consisting of all persons employed in the plants, shops, or yards of the Employer, except foremen and other supervisory officials, timekeepers and checkers, plant protection employees, journeymen sawsmiths, apprentice sawsmiths, and brake press operators, painters, carpenters and confidential salaried employees, including the South Illinois Street Plant and Fall Creek Ordnance Plant at Indianapolis, Indiana, and the Portland, Oregon, and Seattle, Washington, Plants, as established by the Decision and Direction of Election of the National Labor Relations Board, entered

March 10, 1943, in a certain proceeding entitled "In the Matter of E. C. Atkins & Company and United Steelworkers of America, Local 1543, Affiliated with the C. I. O.," being Case No. R-4820, upon the docket of such Board, as affected and amended by supplements to such Decision entered March ....., 1943 and April 15, 1943, such unit being hereinafter referred to as the "Appropriate Bargaining Unit." The term "employee," as used in this Agreement, shall include each and every member of the Appropriate Bargaining Unit.

(b) Designation of Union. The collective bargaining negotiations between the Union and the Employer resulting in the negotiation and execution of this Collective Bargaining Agreement are conducted pursuant to the Decision of the National Labor Relations Board, as amended and supplemented, hereinabove referred to.

(c) Recognition. The Employer hereby recognizes the Union as the Exclusive collective bargaining agency for all members of the Appropriate Bargaining Unit in respect to rates of pay, wages, hours of employment, or other conditions of employment; provided that any employee in such Appropriate Bargaining Unit shall have the right at any time to present grievances to the Employer. The Union and its Negotiating Committee, in conducting the negotiations resulting in the execution of this Collective Bargaining Agreement, hereby represent and warrant to the Employer that they have acted, and are acting, pursuant to the authority conferred as the exclusive collective bargaining agency for and in behalf of all members of the Appropriate Bargaining Unit, and with the intent that all members of the Appropriate Bargaining Unit shall be bound by all the terms of this Collective Bargaining Agreement.

(d) Co-operation. It is the intent and purpose of the parties to this Agreement to promote and improve industrial and economic relationships between the employees and the Employer, and to set forth herein the basic agreement governing rates of pay, wages, hours of employment, or other conditions of employment.

Section 2—Union Shop

All employees eligible shall become members of the Union within thirty (30) days after employment. The Employer shall have the exclusive right to determine the source or sources of applicants for employment, and shall be the sole judge of the requirements and qualifications of such applicants.

• • • • •

RESPONDENT EXHIBIT NO. 18.

Agreement

Section 1.

This Agreement entered into this first (1) day of July 1940 by and between E. C. Atkins & Co., hereinafter referred to as the Employer, and Saw Smiths' Local Union No. 18548, known as Anvil Men, affiliated with the American Federation of Labor, hereinafter referred to as the Union, representing all Employes in Indianapolis who are Anvil Men.

Section 2.

The Employer agrees to employ only Saw Smiths in good standing with the Union, and the Union agrees to furnish the Employer with a sufficient number of competent workers (if available) whenever called upon to do so. This Union Recognized as Federal Labor Union No. 18548 reserves the right to accept or reject any journeymen anvilman. In case of rejection this Union can reserve the right not to work with him.

Section 3.

One Dollar ($1.00) an hour shall constitute the minimum rate of wages for any one hour's day work or piece work. Where existing wage rates are paid the Employe in excess of the scale herein provided, said scale shall remain at the highest rate and nothing herein contained shall be construed to permit reduction in such higher rate of pay.

Section 4.

Eight (8) hour's shall constitute a day's work and forty (40) hour's shall constitute a week's work, with time and

one-half for all time worked in excess of these hour's. All work done on Saturday shall be considered overtime. Double time for all work done on Sunday and all legal holidays.

Section 5.

Each apprentice now working shall be required to serve four (4) years on the anvil at day work, and in no way will he be considered a journeyman until he has completed his specified four (4) years. He shall at no time be given preference over a journeyman. There shall be no apprentices put on the anvil during the life of this contract.

Section 6.

There shall be no discrimination against age or ability. In event there is, it shall be referred to the grievance committee.

Section 7.

Each Anvil man, after having served one (1) year of accumulated service with E. C. Atkins & Co., shall receive one week's vacation with pay.

Section 8.

This Agreement, shall be and remain in full force and effect from this date, until one (1) year from date of signing of this contract, and shall continue in effect annually thereafter, unless thirty (30) day's notice in writing is submitted prior to the expiration of this agreement, of any desire to change or amend same. It is agreed, however, that this contract may be opened at the request of the Union, thirty days after the signing of this agreement for the question of wages.

E. C. Atkins and Company
Henry C. Atkins, Jr.,
Supt.

Saw Smith's Federal Labor Union
No. 18548
President Chas Schafer, Jr.
Secretary Eddie Vespo
Treasurer Henry H. Lott

American Federation of Labor
Hugh Gormley,
Gen. Representative.

THIS IDENTIFIES

Cyrus Elvin Wood — NAME

Personnel — BADGE NO.

AS AN EMPLOYEE OF

E. C. ATKINS AND COMPANY

INDIANAPOLIS, INDIANA

FALLCREEK ORDNANCE PLANT

Cyrus E. Wood

PERSONNEL DIRECTOR

This Card Must Be Surrendered Upon Termination of Employment

DATE EMPLOYED October 6, 1[illegible]

AGE	WEIGHT	HEIGHT	EYES	HAIR
51	195	6'	BR	Gray

FINGERPRINT LEFT INDEX

FINGERPRINT RIGHT INDEX

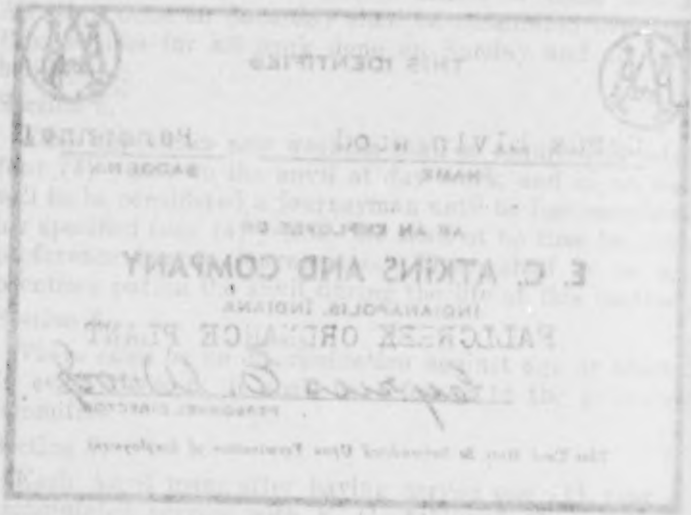
NATIONAL LABOR RELATIONS BOARD

CASE NO. 7-R-120 | EXHIBIT NO. 21

IN THE MATTER OF E. C. Atkins Co

DATE 7-24-44 WITNESS

[illegible]



RESPONDENT EXHIBIT NO. 101.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

APPLICATION FOR SUBPOENA DUCES TECUM DIRECTED AT F. M. RICHARDSON TO PRODUCE UNION RECORDS.

Comes now E. C. Atkins and Company, one of the parties to this proceeding, and respectfully applies for a subpoena duces tecum directed at F. M. Richardson, Business Representative, International Association of Machinists, District 90, and their affiliate Local 1683 (hereinafter referred to as the "Union"), one of the parties to this proceeding, to produce the following documents:

1. Charter, Constitution and By-laws of the Union;

2. Minute book; membership roll; application cards; membership cards; dues books; bank book; check book; cancelled checks; collective bargaining agreements executed by and between the Union with other plants in the Indianapolis area covering the plant guards on duty at such plants; copies of grievances filed under such collective bargaining agreements, records of the hearings arising under the same, and decisions made with respect to such grievances by the Union and the respective employer, or the umpire, in the case; copies of seniority lists posted under such

collective bargaining agreements; copies of orders affecting the wages, discipline, disputes, etc. arising in said various plants, as rendered by the National Labor Relations Board, the National War Labor Board, and the various trial examiners and subsidiary tribunals; correspondence; and other records relating to the purposes, activities and membership of said Union;

in order that E. C. Atkins and Company may establish (a) the identity of the Union, within the purview of Section 2, subsection (5) of the National Labor Relations Act; (b) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," are "employees" within the purview of Section 2, subsection (3) of the National Labor Relations Act; (c) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," within the purview of Section 7 of the National Labor Relations Act; (d) whether it is an unfair labor practice for E. C. Atkins and Company "to refuse to bargain collectively with the representatives of "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," within the purview of Section 8, subsection (5) of the National Labor Relations Act; (e) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," can properly be found to be a "unit appropriate for the purposes of collective bargaining" with E. C. Atkins and Company, within the purview of Section 9, subsection (b) of the National Labor Relations Act; and (f) whether the provisions of the collective bargaining agreements, statements of grievance, seniority

ists, and orders entered by the National Labor Relations Board and National War Labor Board, covering the units of "plant guards" subject to organization by the Union at other plants in the Indianapolis area do not contain provisions which are incompatible with the service of the auxiliary military police at the plants of E. C. Atkins and Company in the military service.

E. C. Atkins and Company
By Kurt F. Pantzer,
Attorney.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner,
vs.
E. C. Atkins and Company,
Respondent.
} Case No. 8669.

MOTION OF RESPONDENT, E. C. ATKINS AND COMPANY, TO REQUIRE PETITIONER TO CONFORM APPENDIX AND BRIEF TO THE RULES OF THIS COURT.

Comes now E. C. Atkins and Company, the Respondent in this cause, and in support of its motion to require Petitioner to conform Appendix and Brief to the Rules of this Court, alleges:

1. That the "Appendix to Petitioner's Brief," filed in this cause on September 6, 1944, fails to comply with Rule 35, Section 4, clause (c), of this Court, requiring the Petitioner to "print as a part of the appendix to his brief the pleadings, together with the findings of fact, conclusions of law, order and opinion of the board," in that such Appendix fails to set forth the "Statement of Exceptions to Intermediate Report, Record, and Proceedings," executed by the Respondent on March 6, 1944, and filed in this cause on March 8, 1944, consisting of fourteen typewritten pages.

(a) Section 32 of the Rules and Regulations Series 3 of the National Labor Relations Board, effective November 26, 1943 (before February 19, 1944, the date of the Intermediate Report rendered by Trial Examiner Persons herein), provides as follows:

"Sec. 32. *Intermediate Report; contents; service; transfer of case to Board.*—After a hearing for the purpose of taking evidence upon a complaint, the Trial Examiner shall prepare an Intermediate Report * * *."

(b) Section 33 of the Rules and Regulations Series 3 of the National Labor Relations Board, effective November 26, 1943, provides as follows:

"Sec. 33. *Exceptions; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exception.*—Within fifteen days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of this Article, any party or counsel for the Board may file with the Board at Washington, D. C., an original and four copies of a statement in writing setting forth such Exceptions to the Intermediate Report or to any other part of the record or proceeding (included rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. * * *"

(c) Section 35 of the Rules and Regulations Series 3 of the National Labor Relations Board, effective November 26, 1943, provides as follows:

"Sec. 35. *Action of Board upon expiration of time to file Exceptions to Intermediate Report; oral arguments before and filing of briefs with Board; action of Board where Trial Examiner finds no unfair labor practices and no Exceptions filed; reopening of record.*—Upon the expiration of the period for filing a statement of Exceptions and brief, as provided in Section 33 of this Article, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other agent or agency, or may close the case upon the compliance with the recommendations of the Intermediate Report, or may make other disposition of the case. * * *"

(d) The "Statement of Exceptions to Intermediate Report, Record, and Proceedings," executed by the Respondent on March 6, 1944, and filed in this cause on March 8, 1944, is, in the opinion of the Respondent, a pleading absolutely essential to the record of this case in this Court.

2. That the "Brief for the National Labor Relations Board," filed in this cause on September 18, 1944, fails to comply with Rule 35, Section 5, and Rule 16, Section 4, of this Court, requiring the statement of facts to show the pages of the transcript of the record, in which the "War Department Regulations providing for the Activation of Auxiliary Military Police Units," set forth as an "Addendum" at pages 20 to 44, both inclusive, of such Brief (hereinafter referred to as the "War Department Regulations"), appear.

(a) The War Department Regulations were never offered or admitted in evidence in this case and do not constitute a part of the "Transcript of the Record filed in this Court," referred to in Rules 34 and 35.

(b) The War Department Regulations are the principal basis of the arguments set forth in points A. and B. of the Petitioner's Brief (see all references marked "*infra*" on pages 8 to 12, both inclusive, of such Brief).

(c) At the hearing held September 24, 1943, the only military orders offered in evidence to show the relationship between the plant guards and the War Department were Guard Order No. 1, dated May 10, 1943 (Respondent's Exhibit No. 10); Guard Order No. 2, dated May 11, 1943 (Respondent's Exhibit No. 11); and Guard Order No. 3, dated May 12, 1943 (Respondent's Exhibit No. 12), all issued by the Continuous Security District Office of the War Department, at Cincinnati, Ohio, and issued over the signature of B. R. Witenhall, Captain C. M. P. District Plant Guard Officer, and letter under date of June 7, 1943 (Respondent's Exhibit No. 4), issued over the signature of A. C. Rasmussen, Lt. Col., Ord. Dept. District Chief. All the issues herein, both in the representation proceedings and the unfair labor practice proceeding, were tried upon the assumption that the said Respondent's Exhibits Nos. 10, 11, 12, and 4, were the sole written exhibits setting forth the military orders showing the relationship between the plant Guards and the War Department.

(d) No request was either made or granted in the

representation case or at the hearing in the unfair labor practice case to take judicial notice of the terms and conditions of the War Department Regulations.

(e) The War Department Regulations are not such a document as this Court may take judicial notice of at the argument, or in rendering its decision herein.

(f) If the War Department Regulations are permitted to be the basis of Petitioner's case herein, they substantially change the theory of such case and the evidence upon which it is based. It is, therefore, imperative for the Respondent to know in advance of writing Respondent's brief whether or not the War Department Regulations are properly before this Court.

Wherefore, the Respondent prays this Court that it order the Petitioner to do the following:

1. Supplement the "Appendix to Petitioner's Brief" by setting forth therein the "Statement of Exceptions to Intermediate Report, Record and Proceedings," executed by the Respondent on March 6, 1944, and filed in this cause on March 8, 1944.

2. Strike out from the "Brief for the National Labor Relations Board" the War Department Regulations set forth as an Addendum at pages 20-44 thereof, and all references to such addendum contained in such Brief.

Barnes, Hickam, Pantzer & Boyd,
By Kurt Pantzer,
Attorneys for Respondent.

Filed Sept. 26, 1944.

MEMORANDUM OF NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO RESPONDENT'S MOTION TO REQUIRE THE BOARD TO SUPPLEMENT ITS APPENDIX AND TO STRIKE CERTAIN PORTIONS OF ITS BRIEF.

I.

With respect to respondent's motion that the Board be required to supplement the appendix to its brief by setting forth respondent's "Statement of Exceptions to Inter-

mediate Report, Record, and Proceedings" dated March 6, 1944, the Board desires to inform the Court that the Board, by letter dated September 28, 1944, authorized the printer to prepare a supplemental appendix containing this document, which the Board inadvertently failed to designate for printing in the Designation heretofore filed herein.

II.

Respondent's motion that the Board be required to strike from its brief the War Department Regulations providing for the Activation of Auxiliary Military Police Units, dated March 17, 1943, which the Board included as an addendum to its brief, should be denied for the following reasons. The Regulations in question were promulgated by the War Department pursuant to the authorization contained in Executive Order No. 8972 dated December 12, 1941, issued by the President in the exercise of his constitutional authority as Commander in Chief of the Army and Navy of the United States for the purpose of affording protection of national defense material, premises, and utilities from injury or destruction. It is well settled that such regulations, like regulations of executive officers of the government issued in the exercise of their statutory functions, have the force and effect of law. *United States* v. *Grimaud*, 220 U. S. 506, 520-523; *United States* v. *Morehead*, 243 U. S. 607, 613-616; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488. Having such effect, the regulations in question, even though not formally introduced into evidence, may be judicially noticed by this Court just as decisions of the courts and administrative agencies and acts of Congress are judicially noticed and considered. *Caha* v. *United States*, 152 U. S. 211, 221-222; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488; *Givens* v. *Zerbst*, 255 U. S. 11, 18.

Having the force and effect of law, the Board may rely on these Regulations in its argument to this Court and the Court may take notice thereof and consider them, irrespective of the fact that respondent was not specifically put

upon notice at the hearings before the Board as to the scope of the Board's argument to be presented in this Court. Respondent is presumed to be familiar with the basic authority underlying Lt. Col. Rasmussen's action in issuing the letter of June 7, 1943, which assertedly governed the militarization of respondent's plant guard forces. As the Supreme Court has held, "those dealing with an agent of the United States must be held to have had notice of the limitations of his authority." *Wilber National Bank* v. *United States*, 294 U. S. 120, 123-124; *Sutton* v. *United States*, 256 U. S. 575, 579; *Whiteside* v. *United States*, 93 U. S. 247, 256-257.

Moreover, Lt. Col. Rasmussen's letter of June 7, 1943, which respondent introduced in evidence, referred to the action of the Secretary of War in directing the military organization of plant guard forces as Auxiliary Military Police (B. A. 58-58i, par. 1). Thus respondent was put upon notice of the existence of the underlying authority for Lt. Col. Rasmussen's action in issuing the letter of June 7, 1943, concerning the militarization of civilian guard forces. In these circumstances, particularly, respondent may not validly claim that it was taken by surprise by the Board's reliance in this Court upon the basic War Department Regulations governing the militarization of civilian guard forces.

Wherefore, the National Labor Relations Board, petitioner herein, prays that respondent's motion to require the Board to strike said War Department Regulations from its brief herein be denied forthwith, or in the alternative, that the Court reserve its decision on said motion pending its consideration of this cause on the merits.

Respectfully submitted,

Malcolm F. Halliday,

Associate General Counsel, National Labor Relations Board.

Dated: September 30, 1944.

Filed October 2, 1944.

REPLY OF RESPONDENT, E. C. ATKINS AND COMPANY, TO ANSWER MEMORANDUM OF PETITIONER RESPECTING MOTION OF RESPONDENT TO REQUIRE PETITIONER TO STRIKE ADDENDUM, AND ALL REFERENCES TO ADDENDUM, FROM PETITIONER'S BRIEF.

Comes now E. C. Atkins and Company, the Respondent in this cause, and for reply to the Answer Memorandum of the Petitioner respecting the Motion of Respondent to require the Petitioner to strike the Addendum, and all references to the Addendum, from the Petitioner's Brief, alleges:

1. The "Addendum," which, together with references thereto, the Respondent has moved to be stricken from Petitioner's Brief, is Circular No. 15, dated March 17, 1943, issued by the Headquarters, Army Service Forces, Washington, D. C., relating to "Auxiliary Military Police." In Respondent's Motion, and in this Reply, such Circular is referred to as the "War Department Regulations."

The Petitioner's Memorandum advises that the War Department Regulations "were promulgated by the War Department pursuant to the authorization contained in Executive Order No. 8972 dated December 12, 1941, issued by the President in the exercise of his constitutional authority as Commander in Chief of the Army and Navy of the United States for the purpose of affording protection of national defense material, premises, and utilities from injury or destruction."

The Respondent denies that the War Department Regulations were promulgated by the War Department, as is perfectly obvious upon perusal thereof. In this sense, both the use of the words "War Department" by the Petitioner and the citation of the cases of the Petitioner are a trifle loose and inaccurate. The Respondent admits that Executive Order No. 8972, dated December 12, 1941, was issued by the President. Executive Order No. 8972, dated December 12, 1941, of which this Court is *required* to take judicial notice pursuant to the provisions of Sections 304, 305 and

307 of the Federal Register Act (U. S. C. A. 44, § 301 ff. July 26, 1935) reads as follows:

"Executive Order 8972

Authorizing The Secretary Of War And The Secretary Of The Navy To Establish And Maintain Military Guard And Patrols, And To Take Other Appropriate Measures, To Protect Certain National-Defense Material, Premises, And Utilities From Injury Or Destruction.

Whereas the United States is now at war; and

Whereas there exists a serious and immediate potential danger of sabotage to national-defense material, national-defense premises, and national-defense utilities which may menace our maximum productive effort; and

Whereas the Congress of the United States has in recent enactments recognized this danger by enjoining efforts to injure, interfere with, or obstruct the national defense, and providing severe penalties therefor; and

Whereas it is considered necessary in the interests of national defense that, in particular situations where hazardous, dangerous, or other unfavorable conditions may from time to time exist, special precautionary measures be taken by establishing and maintaining military guards and patrols or other appropriate means to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities:

Now, Therefore, by virtue of the authority vested in me as President of the United States, and Commander-in-Chief of the Army and Navy of the United States, I hereby authorize and direct the *Secretary of War, whenever he deems such action to be necessary or desirable,* and the Secretary of the Navy, whenever he deemes such action to be necessary or desirable, to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury or destruction national-defense material,

national-defense premises, and national-defense utilities, as defined in the act of April 20, 1918, 40 Stat. 533, as amended by the act of November 30, 1940, 54 Stat. 1220, and the act of August 21, 1941, 55 Stat. 655.

This order shall not be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, Department of Justice, with respect to the investigation of alleged acts of sabotage.

Franklin D. Roosevelt

The White House
December 12, 1941." (Emphasis Ours)

One of the principal purposes of the Federal Register Act was to make available, *for the purpose of constructive notice and judicial notice,* the fast multiplying Executive Orders, Directives, Regulations, etc., which the Federal Government is promulgating. It would seem to be safe and fair to the average citizen to assume that he need not take constructive notice of any other documents. Certainly, that clause of Section 307 of the Federal Register Act, which provides that "unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under § 305 of this chapter, shall, except in cases where notice by publication is insufficient in law be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby," does not affirmatively apply to the War Department Regulations upon which the Petitioner at this late date now desires to base its case.

The six cases cited by the Petitioner in its Brief are all cases in which a statute expressly directed the head of an Executive Department, or Administrative Department, such as the Secretary of War, personally, or the Interstate Commerce Commission, to promulgate rules and regulations in the first instance, or to approve them as promulgated after they have been prepared by a subordinate officer or bureau. In not one of the cases is a regulation, not promulgated under the hand of the head of the Executive Department, or by order of the Administrative Tribunal concerned, given statutory effect or judicially noticed.

It is to be kept in mind that in the instant case, the Petitioner is seeking an Enforcement Order or Injunction against the Respondent upon the theory that the Respondent was guilty of an Unfair Labor Practice by virtue of having refused to obey the War Department Regulations referred to. These War Department Regulations were neither introduced in evidence nor referred to at any one of the following occasions in which this matter has been in controversy:

1. The hearing on the representation petition.
2. The Decision and Order on the representation petition.
3. The hearing in the Unfair Labor Practice Case.
4. The Intermediate Report in the Unfair Labor Practice Case.
5. The argument in Washington before the National Labor Relations Board in the Unfair Labor Practice Case.
6. The Final Decision and Order in the Unfair Labor Practice Case.

Neither is Executive Order No. 8972, dated December 12, 1941 and issued by the President, *or* the War Department Regulations, referred to in any way, shape or form in the "Petition for Enforcement of an Order of the National Labor Relations Board," executed August 24, 1944, which is now pending before this Court. (Appendix to Petitioner's Brief, pp. 1 to 4.)

Although the decision in *Nagle* v. *United States*, 145 Fed. 302 (CCA 2 (1906)) has probably been overruled if the rules and regulations therein referred to were issued over the signature of the Postmaster General (the head of a Federal Executive Department), common sense of the decision is doubtless still good, and is consequently here quoted for the purpose:

> "Reference is made to the regulations of the post office, and some sections thereof are printed in the brief, but none of them are set forth in the record. The decisions of the Supreme Court on the subject of judicial notice of such rules and regulations are not entirely uniform. *Caha* v. *U. S.*, 152 U. S. 221, 14 Sup.

Ct. 513, 38 L. Ed. 415; *The E. A. Packer*, 140 U. S. 367, 11 Sup. Ct. 794, 35 L. Ed. 453. Where there is some question of statute law, where the court can itself by reference to books with which it is familiar, and which each judge possesses, determine just what statutory provisions were in force at a given date, there is no necessity for incumbering the record with them. But it is different with departmental regulations. No department ever sends its compilation of regulations to the judges. They are frequently amended, and, without special information from the department, no one can tell whether a particular regulation in some printed compilation was in force a year later. It is grossly unfair to a trial judge to cite some regulation upon a brief on appeal which was not laid before him on the trial. We have no doubt that it is far better practice to read any special regulations which may be relied upon into the record before the trial court. It is a hopeless task for an appellate court to determine what such regulations were at any particular time. It must either accept counsel's statement, or itself make inquiry of the particular department; neither of which practices is to be commended. It is to be hoped that upon the new trial the various regulations bearing upon the questions presented by the case may be specifically referred to."

The Respondent again shows that in order properly to analyze the Petitioner's case on this appeal, and further to prepare Respondent's Brief, the decision of this Court should be made prior to the preparation and filing of such Brief, and not be kept pending the consideration of this cause by this Court on its merits.

Wherefore, E. C. Atkins and Company, the Respondent herein, prays that the Respondent's Motion to Require the Board to strike said War Department Regulations, and any and all references thereto, from its Brief be granted.

Barnes, Hickam, Pantzer & Boyd,
By Kurt Pantzer,
Attorneys for Respondent.

Dated at Indianapolis, Indiana, October 4, 1944.

Filed October 5, 1944.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

October 9, 1944.

Before Hon. William M. Sparks, Circuit Judge.

National Labor Relations Board, *Petitioner,*
No. 8669 *vs.*
E. C. Atkins and Company, *Respondent.*

Petition for Enforcement of Order of the National Labor Relations Board.

It is ordered that the motion of respondent to require petitioner to conform appendix and brief to the rules of this Court be, and it is hereby, overruled, without prejudice to the right to present it at the hearing on the merits.

Excerpts from the Three Decisions of the National Labor Relations Board Cited in its Decision and Direction of Election (1 B. A. 35-6) as Being Cases in Which Employers Had Advanced the Contention That Auxiliaries of the Military Police Are Not Employees Within the Meaning of the National Labor Relations Act.

1. The Phelps Dodge Case.
2. The Chrysler Case.
3. The Dravo Case.

The Phelps Dodge Case.

Excerpt from the Decision of the National Labor Relations Board In the Matter of Phelps Dodge Copper Products Corp. and United Electrical, Radio & Machine Workers of America, Local No. 441, Affiliated with the Congress of Industrial Organizations (41 NLRB 973).

Hearing: April 27, 1942

Decision: June 15, 1942

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III. The Question Concerning Representation.

Shortly before the filing of the petition herein, the Union requested the Company to recognize it as the sole collective bargaining agent on behalf of the Company's guards at its Bayway plant. The Company refused to accord the Union such recognition upon the ground that the Union was the collective bargaining agent for the production workers in the plant and that the guards should not have the same representative as the production workers. Thereafter, the Union and the Company attempted to arrive at an amicable agreement which apparently contemplated setting up a separate local for the guards. No agreement was reached, however, and the Union proceeded with its petition.

A statement of the Regional Director introduced in evidence shows that the Union represents a substantial num-

the relationship between the Company and the guards is that of employer and employee. We find nothing in the duties of the guards set forth above to warrant a finding that they may be denied the rights to self-organization and collective bargaining guaranteed employees under the Act. We find that the guards are employees within the meaning of Section 2 (3) of the Act and are entitled to the benefits of the Act.

The Company contends, further, that the Union may not represent both a unit of guards and a unit of production and maintenance employees. But if the guards are employees within the meaning of the Act, then obviously it is not for the Company or for the Board to say that they may not join unions of production workers or designate such unions to represent them for purposes of collective bargaining.

• • • • •

The Chrysler Case.

Excerpts from the Decision of the National Labor Relations Board In the Matter of Chrysler Corporation, Highland Park Plant and Local 114, United Automobile, Aircraft and Agricultural Implement Workers of America, Affiliated with the C. I. O. (44 NLRB 881).

Hearing: July 13, 1942

Decision: October 7, 1942

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Statement of the Case.

Upon petition duly filed by United Protective Workers of America, Local #1, herein called the Protective Workers, alleging that a question affecting commerce had arisen concerning the representation of employees of Chrysler Corporation, Detroit, Michigan, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Charles E. Persons, Trial Examiner.[1]

• • • • •

IV. The Appropriate Unit.

The International contends that plant-protection employees at the Highland Park, McKinstry, and Dearborn plants of the Company in the Detroit metropolitan area constitute an appropriate unit. **As in the prior representation proceeding noted above, the Company takes the position that the confidential and disciplinary nature of the tasks assigned to plant-protection employees constitutes**

1. Charles E. Persons, the Trial Examiner in the representation hearing in the *Chrysler Case*, was also the Trial Examiner in the unfair labor practice hearing in the instant case and rendered the intermediate report to which exceptions are taken. (B. A. 21-33.)

them instruments of management[2] and that the proper performance of their duties precludes their inclusion as employees in a bargaining unit. The Company and the International agree that, if the Board finds that there is an appropriate unit within the scope of the petition, chiefs, captains, fire chiefs, fire marshals, sergeants, desk sergeants, relief sergeants, and confidential clerks should be excluded from the bargaining unit.

Plant-protection employees have similar duties in all the Company's plants. They guard the Company's property against espionage, theft, trespass, and fire and accident hazards. They enforce safety and disciplinary regulations. They examine packages leaving and entering the plants. They investigate and report to the military authorities occurrences which arouse their suspicion. The present production of war materials at the Company's plants increases the importance of their work and their responsibilities.

The War Department has recently issued a directive order, making plant-protection employees at plants producing war materials civilian auxiliaries of the military police.[3] Under appropriate Army supervision, they are being trained and equipped to meet the additional responsibility placed upon them. The Company contends that, even if their ordinary duties do not bar them from rights

2. (Emphasis Ours.) As in the *Phelps Dodge Case*, the contention of the employer in the *Chrysler Case* was that plant-protection employees were part of the management and consequently not properly included in the collective bargaining unit. In the instant case, it is the contention of the Respondent that the plant guards concerned are in no sense of the word representatives, agents or employees of management, but are "representatives", if not "employees" of the United States Army.

3. (Emphasis Ours.) Doubtless the "directive order" of the War Department is not a "directive order" signed by the Secretary of War, but merely a circular issued by Major General J. A. Ulio on July 2, 1942, eleven days before July 13, 1942, the day on which the *Chrysler Case* was tried. (Board's Brief, pp. 41-42, citing material which is not in evidence.) Circular No. 52, Headquarters, Services of Supply, August 28, 1942, subject "The Military Organization of Plant Guard Forces" had not yet been promulgated, much less Circular No. 15, Headquarters, Army Service Forces, March 17, 1943, subject "Auxiliary Military Police," which seems to be the basis of the Board's Brief. (Board's Brief, p. 20, citing material which is not in evidence.) It is to be noted in the *Chrysler Case* that the Board considers absolutely no testimony as to the actual practices respecting the right to hire, the right to fire, the right to direct the particulars of employment, and other incidents of the employer-employee relationship of Chrysler employees.

guaranteed under the Act, this military regulation changes their employment status and that they are no longer "employees" within the meaning of the Act. We do not agree. **The directive order specifically preserves the essential employment relationship.**[4] The employer's right to discharge for cause remains. Hiring, compensation for services performed, and general working conditions remain matters to be adjusted between the employer and the employees through the usual employment contract.

• • • • •

4. (Emphasis Ours.) It is the contention of the Respondent that the "directive order" of Major General J. A. Ulio, Adjutant General, promulgated July 2, 1942, cannot in any sense of the word be found specifically "to preserve the essential employment relationship." There is no word, as contained in the directive order, as to the rights of discharge, hiring, compensation for services, and adjustment of general working conditions. It is to be noted that "the usual employment contract" referred to by the Board is merely "the agreement between the United States of America and the plant guards." (Respondent's Exhibit No. 2, R. A. 54-5; Petitioner's Brief, pp. 43-4.)

The Dravo Case.

Excerpt from the Decision of the National Labor Relations Board In the Matter of Dravo Corporation and Industrial Union of Marine & Shipbuilding Workers of America (C. I. O.) (52 NLRB 322).

Hearing: June 17, 1943

Decision: August 30, 1943

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The Union seeks a unit comprised of all plant-protection employees at the Neville Island shipyard, excluding supervisory employees. The Company contends that the duties of its plant-protection employees are such that they necessarily come into conflict with the interests of the production and maintenance employees. Since the Union already represents the production and maintenance employees, the Company argues that it is improper to permit plant-protection employees to be represented by the same labor organization, albeit in separate bargaining units. In a communication to the Chairman of the Board, a copy of which is in evidence, the United States Army, Navy, and Maritime Commission urge the Board to exclude plant-protection employees who are enrolled as Auxiliary Military Police or in the Coast Guard Reserve of the Navy, from bargaining units of production and maintenance employees.

The unit here sought is composed of guards, watchmen, fleet watchmen, and firemen. All of these employees are hired and paid by the Company which is reimbursed by the Navy for its expenditures on wages, Social Security and Workmen's Compensation taxes. All employees are hourly paid, and their wage rates are set by the Company, subject however, to the approval of the Navy Department.

Guards.—In addition to the chief guard, lieutenants and sergeants, who are excluded from the unit by agreement, the Company employs approximately 114 guards. They are attached to the Company's Safety Department, are uniformed and carry firearms. They are enrolled members

of the Coast Guard Reserve, bearing ratings of First Class Petty Officer or Boatswain's Mate. Some 40 guards are likewise members of the Pennsylvania Volunteer Police Officer Force. Besides being answerable to the Company for the proper discharge of their duties, the guards are subject to the Articles for the Government of the Navy, the General orders of the Supervisor of Shipbuilding of the Navy, and the discipline of the Coast Guard.

In general, the guards are responsible for the protection of the shipyard and Government property entrusted to their care. They see that only persons with proper identification enter or leave the plant, and that objects taken from the shipyard are accompanied by clearance passes. They maintain order throughout the plant, particularly at the gates, in the company cafeteria, and among the crowds at launching ceremonies. They direct traffic on the Company's parking lot and on adjacent public highways. They escort discharged employees through tool and time clearance. They make routine checks of buildings and other plant facilities and make reports of any unusual conditions. They carry master keys to all the locks located in the shipyard area, and open tool boxes for the employees and keep records of the materials removed and the employees who remove them. The guards must be alert to all suspicious circumstances and are required to report such things as loafing by employees, refusal of employees to wear proper identification, any unsafe practices which come to their attention, violations of the law, and possible sabotage. If a guard discovers some action by an employee which requires immediate attention, he reports the matter to the foreman of the employee involved. When the matter does not require immediate attention by a supervisor, the guard reports it to the chief guard who reports the matter to various Company officials and to a Navy representative. **The guards have discharged their duty when they report incidents to their superior or to a production foreman. They have no discretion as to the type of penalty which is meted out for infraction of rules and have no supervisory functions with respect to the production employees but can merely report incidents of employee conduct which are**

in violation of rules and regulations or which are hazardous to the war effort.[1]

* * * * *

We turn now to the consideration of the various contentions made by the Company in support of its argument that the unit herein sought is inappropriate. **The Company first contends that the plant-protection employees are a part of management.**[2] Despite the peculiar relationship which plant-protection employees bear to management, they are not to be denied any of the rights or privileges granted under Section 7 of the Act. We have often held, as we do now, that plant-protection officers exercise monitorial and not supervisory functions. The record in the instant case affords ample evidence that the guards have no disciplinary authority over the production and maintenance employees, so that while disciplinary measures may result from a report made by a guard, such action is the conduct of the supervisor of the employees involved, and not the conduct of the guard. **At the oral argument the Company urged that plant-protection employees perform managerial functions which are delegated to them by the Company's Board of Directors.**[2] While it is true that management may have partially delegated certain duties to plant-protection employees, this does not mean that such employees are deemed to be a part of management or should not be regarded as "employees" within the meaning of the Act.

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1. (Emphasis Ours.) It is to be noted that the guards in question were members of the Coast Guard Reserves and were subject to the Articles for the Government of the Navy, the general orders of the Supervisor of Shipbuilding of the Navy, and the discipline of the Coast Guard. In this respect the guards in the *Dravo Case* are entirely different from the guards in the instant case, the latter being subject to the Articles of War. (Respondent's Exhibit No. 9; R. A. 53-61.) In addition the plant guards at the Atkins plant have not discharged their duty when they report incidents to their superior or to a production foreman. As a matter of fact, they have absolutely no obligation to make reports to a production foreman, their only duty and right being to report to another member of the Auxiliary Military Police.

2. (Emphasis Ours.) Again it is pointed out that in the instant case there is absolutely no contention that the plant guards "perform managerial functions which are delegated to them by the Respondent's Board of Directors." The sole contention of the Respondent is, and the facts amply show, that the Respondent, E. C. Atkins and Company, has in no manner whatever sought to exercise any authority or control over the plant guards and that all authority and control over them is exercised by the Army officers in command of the Auxiliary Military Police.

This Board has never held that the acts of plant guards are unfair labor practices which can be imputed to an employer in the absence of circumstances indicating that the employer authorized or ratified the conduct in question. In this respect, guards and other plant-protection employees are quite different from foremen or other supervisory personnel. In the second *Maryland Drydock* decision we expressly overruled such a contention saying, "the considerations which impelled a majority of the Board recently to hold that supervisory employees may not constitute appropriate bargaining units are here inapplicable." This proceeding presents no novel situation of fact which would lead us to depart from that rule.

The second argument raised by the Company deals with a possible conflict of interest which may arise when plant-protection employees join a labor organization. We give no weight to the implication that membership in a union tends to undermine the honesty of plant-protection employees or their competence to execute their duties satisfactorily. Self-organization for collective bargaining is not incompatible with efficient and faithful discharge of duty. Should the performance of an employee deteriorate, the Company always has recourse to its normal disciplinary authority to insure the maintenance of its standards of work.

We come now to the question whether the militarization of guards alters the character of their employment. It cannot seriously be contended at this time that guards who are sworn into temporary membership in the armed services lose thereby any of the benefits of the Act. On this issue, the petitioner and the Company are far apart in their contentions, the Union arguing that the fact the guards are sworn into reserve membership in the armed services is no reason for segregating them from other employees, whereas the Company urges that this should prevent these employees from being represented by any union which represents any other category of personnel employed by the corporation. In our view, neither contention can be supported. We cannot regard the induction of the guards into the Coast Guard Reserve as a meaningless

act, since it does indicate that such persons from the nature of their oaths then owe allegiance directly to the Government, as well as to the corporation. **The services do not contend, however, that such persons thereby become Government employees and are therefore outside the provisions of the Act.**[3] Nor would the facts in this case support such a contention, for it is clear that the wages and **duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards.**[4]

We therefore feel constrained to hold that the guards, as well as other employees, are free to select their own bargaining representatives under the Act.

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3. (Emphasis Ours.) As the evidence cited in Respondent's Brief so amply shows, however, the services *do* contend that plant guards are the "auxiliaries" and "representatives" of the Army and *not of* the Employer. They are subject to direction and discipline of the Army and not of the Employer. The mere incident of *compensation*, alone, does not keep plant guards from being the "representatives" of the Army. Furthermore, as pointed out in Respondent's Brief the National Labor Relations Act has not granted to the War Department the right to issue rules and regulations under the National Labor Relations Act. The sole question for decision in the *Atkins Case* is whether the incidents of "employment" of the plant guards by the Respondent are such as to constitute them "employees" of the Respondent within the meaning of National Labor Relations Act.

4. (Emphasis Ours.) The duties of the Plant guards in the *Atkins Case* did *not* remain unchanged after their induction.

BOARD'S EXHIBIT NO. 105.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

For the Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and Its Affiliate, Local 1683, *Petitioner.*	Case No. 9-R-1200.

BRIEF OF E. C. ATKINS AND COMPANY.

PRELIMINARY STATEMENT.

Under date of September 10, 1943, International Association of Machinists, District 90 and its affiliate, Local 1683, hereinafter sometimes referred to as I.A.M., filed its Petition for Investigation and Certification of Representatives of the plant guards of E. C. Atkins and Company at its two Indianapolis, Indiana, plants with the National Labor Relations Board for the Ninth Region at Cincinnati, Ohio. (Exh. Board 1-A, Tr. 5.) A Notice of Hearing was thereupon issued by Rosemary S. Macke, Acting Regional Director (Exh. Board 1-A, Tr. 5), and a hearing was held at Indianapolis, Indiana, on September 24, 1943, before Trial Examiner Shroyer.

(2)

At the beginning of the hearing E. C. Atkins and Company, hereinafter sometimes referred to as the Company, moved to dismiss the Petition on the ground that the Company is not an "employer" and the plant guards are not "employes" of the Company under the definitions of those terms in the National Labor Relations Act. (Tr. 6.) This motion is reprinted in full in the appendix, *infra*, pages 21-

22. The Trial Examiner referred this motion to dismiss to the Board for ruling. (Tr. 7.)

During the course of the hearing the Company also applied for a subpoena duces tecum directed at F. M. Richardson to produce certain union records alleged to contain evidence in support of the Company's contention that the Petition should be dismissed. (Exh. Company 1, Tr. 11.) This application for a subpoena duces tecum appears in the appendix, *infra*, pages 23-25. The Trial Examiner granted the application with respect to the charter, constitution, and by-laws of the I.A.M. (Tr. 11), but denied the application insofar as it related to the minute book, membership roll, application cards, membership cards, dues book, bank book, check book, cancelled checks, correspondence and other records relating to the purposes, activities and membership of the I.A.M. (Tr. 14.) The Company contends that these union records contain evidence that is relevant to material issues in this proceeding and that the Trial Examiner erred in denying its application for a subpoena duces tecum.

This brief is filed on behalf of E. C. Atkins and Company pursuant to Section 203.9 of the Rules and Regulations of the National Labor Relations Board. The time for filing this brief was extended by telegram to October 11, 1943.

(3)

THE PARTIES.

(1) *The Company.* E. C. Atkins and Company is a corporation organized and existing under the laws of the State of Indiana, with two plants in Indianapolis, Indiana. The main plant in Indianapolis, which occupies two entire city blocks and is bounded on the north by South Street, on the west by Capitol Avenue, on the east by Illinois Street, and on the south by Merrill Street, has been in operation since 1857. The Federal Government owns the new armor plate plant employed by the Company in war production at the southeast corner of Twenty-first Street and Northwestern Avenue. (Tr. 8.)

The Company is engaged in the business of manufacturing and selling saws, tools, and armor plate. Approximately eighty per cent of the raw materials (consisting principally of steel, castings, and lumber) used in the business of the Company is purchased and shipped in interstate commerce from sources outside the State of Indiana, and approximately eighty per cent of the finished products produced by the Company is sold in interstate commerce to purchasers outside the State of Indiana. During the calendar year 1942, the raw materials used by the Company exceeded $500,000 in value and the gross sales price of its finished products was over $1,000,000. The finished product of the Company is disposed of to the United States Government, jobbers, dealers, subcontractors and direct to manufacturing consumers. During the calendar year 1943 to the date of this hearing, the manufacturing and selling operations of the Company have continued substantially along the same lines as those set forth above for the year

1942. (Tr. 9, 10.) The Company admits that it is engaged in interstate commerce within the meaning of that term in the National Labor Relations Act. (Tr. 10.)

(2) *I.A.M.* The International Association of Machinists, unaffiliated, is an international union admitting workers in a machine or metal industry to membership (Exh. Petitioner 1, Tr. 44). Local 1683, the particular unit involved in this proceeding, admits to membership employes of concerns other than the Company (Tr. 37, 45) but all of the members of Local 1683 are employed as plant guards (Tr. 41). There is nothing in its constitution or by-laws that authorizes it to organize plant guards (Tr. 46). On August 18, 1943, an I. A. M. representative wrote a letter requesting recognition of that union as the bargaining agent for the plant guards (Exh. Board 3, Tr. 15); the Company did not reply to the letter (Tr. 15) and still declines to recognize the union (Tr. 16). The I. A. M. is the Petitioner for Investigation and Certification of Representatives in this case.

Facts.

The Company employs approximately 1,267 regular employes, of which 1,208 are members of the C. I. O. Union and 59 are members of the Saw Smiths' Local Union (Tr. 82, 83), and it has entered into contracts with both these unions (Exhs. Company 17, 18, 19, 20, Tr. 85, 88). The representation of these employes is not involved in this proceeding. Prior to the time the Company became engaged in war production, it employed from four to six night watchmen (Tr. 88) but it is now required because of its government contracts to pay the salaries of over

sixty auxiliary military police or plant guards. (Tr. 76, 83, 88-90.) The representation of these plant guards is the subject of controversy in this case. The Company contends that these plant guards are not its employes but are under the control of the United States Army and are therefore employes of the federal government. This point is made clear by the contrast between the status of the Company's regular employes and the auxiliary military police in question which the testimony at the hearing disclosed.

Duties of Plant Guards.

The general duties of auxiliary military police are set forth in a letter issued June 7, 1943, by the Continuous Security District Office of the War Department at Cincinnati, Ohio, and signed by Lieutenant Colonel A. C. Rasmussen. (Exh. Company 4, Tr. 35.) It states on page 2:

> "The mission of a guard force of Auxiliary Military Police is:
>
> "*a.* To provide interior and exterior protection of the plant against sabotage and espionage and natural hazards.
>
> "*b.* To serve with the Army in providing the protection to the plant and its environs in emergency situations."

Specifically their duties include directing traffic, escorting visitors, watching the gates and entrances, transporting cash within the plant, observing productions workers and other activities designed to prevent interruption of production. (Tr. 21.)

(6)

The nature of these duties requires that plant guards work under conditions that are very different from those of any of the company's regular employes. They wear uniforms (Tr. 20), carry guns (Tr. 20), and salute army officers (Tr. 64), and they have the right to arrest anyone in the plant. (Tr. 22, 30, 31, 74.) The company issues identification cards to its production employes, officers, directors and other agents (Exh. Company 21, Tr. 94), and requires them to wear identification badges. (Tr. 94.) In contrast the plant guards carry identification cards issued by the War Department (Exh. Company 3, Tr. 27), and wear arm bands on which are written the words "Auxiliary Military Police". (Tr. 65.) Ordinary employes have to have special passes to enter the armor plate division from outside the plant (Exh. Company 14, Tr. 65), to enter the armor plate division from inside the plant (Exh. Company 15, Tr. 66), or to go in and out of the plant grounds during working hours (Exh. Company 16, Tr. 66), but plant guards are not subject to such regulations. The Company does not give any military instruction to its production employes (Tr. 92), but army officers train the plant guards (Tr. 30). The instructions given the auxiliary military police each week consists of lessons in the use of clubs and fists, pistol marksmanship, military courtesy, methods of arrest, control and prevention of fires and similar topics (Tr. 71), and is under the supervision of Lieutenant Scanlon of United States Army (Tr. 30). These facts show the great dissimilarity between the duties of a plant guard and the job of an ordinary production employe.

(7)

HIRING OF PLANT GUARDS.

Persons seeking to become auxiliary military police apply at the personnel office of the Company and fill out a regular "Application for Employment" (Exh. Company 5, Tr. 24, 50). A representative of the Company interviews the applicant and submits his name to the military authorities at Cincinnati if he is satisfactory (Tr. 95). However, the army officers make the decision as to whether the applicant will be hired after they have made an independent investigation as to his capacity, integrity and patriotism (Tr. 51, 95). The letter issued June 7, 1943, by the Continuous Security District Office of the War Department at Cincinnati and referred to above clearly states:

> "A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." (Exh. Company 4, Tr. 35.)

Applicants who are approved must take an oath to support the Constitution of the United States and the authorized military authorities (Tr. 20, 27, 50), and must sign an "Agreement between the United States of America and ..... Plant Guard" on the form prescribed by the government (Exh. Company 2, Tr. 25). If the plant guard refuses to sign this agreement, his employment will be terminated (Exh. Company 4, Tr. 35, 54). Finally, the army issues a "Certificate of Enrollment" signed for the Commanding General, Fifth Service Command, by Lieutenant Colonel Rasmussen (Exh. Company 6, Tr. 55).

(8)

SUPERVISION AND CONTROL OF PLANT GUARDS.

The supervision of plant guard forces in this area has been provided for as follows:

> "The Commanding General of the Fifth Service Command has designated the Chiefs of the Continuous

> Security Districts as the Commanding Officers in their various districts. * * * They then appoint District Plant Guard Officers, who are in direct charge of plant guard forces of such plants in their districts." (Letter issued June 7, 1943, by the Continuous Security District Office of the War Department at Cincinnati, Ohio; Exh. Company 4, Tr. 35).

Lieutenant Colonel A. C. Rasmussen is District Chief (Exh. Company 4) and Captain B. R. Wetenhall is District Plant Guard Officer for the Cincinnati area (Exh. Company 8). The auxiliary military police at each of the Company's plants are under the direction of a Chief, who has four lieutenants to assist him (Tr. 51).

At present the work of the plant guards is controlled by three General Orders issued by Captain Wetenhall in May of this year (Exhs. Company 10, 11, 12, Tr. 62). The nature of the control which the army maintains over the auxiliary military police is clearly indicated by the following paragraphs from General Order No. 1 (Exh. Company 10):

> "Pursuant to the orders of the War Department, the guard forces at this plant were activated as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

> "All members of the guard force are subject to the Articles of War and may be court-martialed or otherwise punished for violations thereof.
>
> "A commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military Police.
>
> "The mission of this guard force is to provide protection for this plant. In addition to its normal functions, the force or any member thereof, whether on or off duty, is available for military use in any emergency, whether it be the result of floor, fire,

or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. *No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.*"

Within each individual plant the Chief supervises the work of the plant guards. He determines whether the men will automatically trade shifts or will always work the same hours (Tr. 70), he promotes men without reference to seniority (Tr. 67, 77) and the men have no recourse from his disciplinary action (Tr. 67). Although the Chief and the men make every effort to co-operate with the plant management (Tr. 64), they are not subject to the orders of the Company's officers (Tr. 69, 73, 90); it is understood throughout the plant that the auxiliary military police are under the military authorities and are not responsible to the foremen or other Company employes (Tr. 91). The Chief in turn receives his instructions from

Captain Wetenhall, the District Plant Guard Officer (Tr. 59, 63), and he frequently carries on correspondence with Captain Wetenhall concerning the problems that arise in connection with his work (Tr. 79).

Discharge of Plant Guards.

General Order No. 1 issued by Captain Wetenhall and referred to above provides as follows with respect to the discharge of plant guards:

> "No member of the Auxiliary Military Police may resign without the written approval of the District Plant Guard Officer." (Exh. Company 10).

A plant guard may be relieved of his duty temporarily by the Chief of the plant unit or the Company, but neither has the authority to discharge him permanently (Tr. 58). Upon termination of a plant guard's employment the army awards him a "Certificate of Meritorious Conduct" (Exh. Company 7, Tr. 57) unless he is discharged for misconduct,

absence without leave, drunkenness or for some military reason, in which event only a formal release from his agreement with the United States Government is issued (Exh. Company 8, Tr. 58).

The above analysis of the record has demonstrated that the duties of the auxiliary military police are of an extremely different nature from those of ordinary production employes and that as a result the hiring, supervision, control and discharge of such employes is handled by the regular military authorities, who are obviously better qualified to direct plant protection activities than the plant management.

(11)

QUESTIONS PRESENTED.

I. Does the relationship of employer and employee exist between auxiliary military police engaged in guarding a defense plant and the company that operates the plant.

II. Is it a denial of due process under the Federal Constitution for the National Labor Relations Board to refuse to issue a subpoena *duces tecum* for union records at the request of an employer when the union records contain relevant evidence regarding material issues in a representation case.

(12)

ARGUMENT

I. THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE DOES NOT EXIST BETWEEN THE AUXILIARY MILITARY POLICE AND E. C. ATKINS AND COMPANY UNDER THE DEFINITION OF "EMPLOYER" IN SECTION 2 (2) AND "EMPLOYEE" IN SECTION 2 (3) OF THE NATIONAL LABOR RELATIONS ACT.

The protection of defense plants against sabotage and espionage requires employees with skills that are of a very different nature than those of ordinary production em-

ployees. As a result the training and supervision of auxiliary military police has been taken over to a large degree by the Army of the United States. The question is therefore presented whether a company operating a defense plant has relinquished so much of its control over its plant guards to the Army that the relationship of employer and employee no longer exists within the definition of those terms in the National Labor Relations Act (29 U. S. C. A. § 152).[1] In this proceeding it is the contention of the Company that since the hiring, training, supervision and discharge of auxiliary military police depends upon the decisions of Army officers, the Company no longer controls them and is not their employer. If this is the case, the Petition for Investigation and Certification of Representa-

tives should be dismissed, since it is obvious that the Federal Government, the other possible employer involved, is not included within the definition in the Act.

The problem of determining whether the employer-employee relationship exists in a particular situation has also arisen in connection with the Fair Labor Standards Act, which defines the term employee in a similar manner (29 U. S. C. A. § 203).[2]

In *Bowman* v. *Pace Co.*, 119 F. (2d) 858 (C. C. A. 5, 1941), the court decided that a watchman was not an employee of the wholesale grocery company whose premises he guarded, although he was under the direction of the company to some extent, because he was hired and paid by a third person and his discharge was the third person's affair. Likewise in *Williams* v. *United States*, 126 F. (2d) 129 (C. C. A. 7, 1942), the court emphasized the fac-

1. Sec. 2. When used in this Act—
(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State or political sub-division thereof * * *
(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless the Act explicitly states otherwise * * *."

2. Sec. 3. As used in this Act—
(e) "Employee" includes any individual employed by an employer.

tors of direction, hiring, payment and discharge mentioned in the *Bowman* case and held that no relation of "employer and employee" existed for purposes of the federal social security tax. The court said:

> "• • • There seems to be no dispute but that the employer-employee relationship exists only where the person, for whom the work is done, has the right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440; *Jones* v. *Goodson*, 10 Cir., 121 F. 2d 176, 179."

(14)

> "We have already concluded, not inconsistent with the findings of the court below, that the establishments had no right to hire or discharge the members of the orchestra. To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer."

In *Texas Co.* v. *Higgins* (C. C. A. 2, 1941), 118 F. 2d 636, Judge Learned Hand adopted the same position:

> "Were the question presented to us for the first time, we should have no doubt that Thomas and his assistants were not 'employees' of the plaintiff; the Act appears to take over the term as the common law knew it, and at common law they would not be employees. The regulation is in harmony with this assumption, for it enumerates the generally accredited determinants in such cases, of which the most important is the putative employer's control over the employee's business."

The Indiana courts have likewise attached importance to the right of control in deciding whether the relationship of employer and employee is present. In *Mid-Continent Petroleum Corporation* v. *Vicars*, 47 N. E. (2d) 972 (Indiana Supreme Court, 1943), the question was whether an

injured workman was the employee of the lessor or the employee of the lessee of an oil station. The court held that the plaintiff was not the employee of defendant lessor and quoted with approval the following language from *Marion Shoe Co.* v. *Eppley,* 181 Ind. 219, 104 N. E. 65 (1914):

> "The real test is, was appellee, at the time he sustained his injury, under the power and control

> of appellant and subject to its orders and directions in the doing of the work at hand."

The above cases indicate that at least four factors must be considered in determining whether an employer-employee relationship exists. First, who hires the worker? Although applicants are interviewed at the E. C. Atkins and Company plant, the military authorities in Cincinnati make the final decision (Tr. 51, 95). Second, who supervises their work? In the instant case the Chief in the plant unit directs the men (Tr. 67, 70, 77) and he is responsible to the Army officers (Tr. 59, 63, 79). Third, who discharges the guards? The Company and the Chief in the plant unit may suspend a member of the auxiliary military police but the military authorities actually discharge him (Tr. 58, Exh. Company 10). Fourth, who pays the men? The Company pays the plant guards (Tr. 23). It is submitted that the first three criteria (hiring, supervision, and discharge) clearly show that the federal government is the employer of the auxiliary military police and that these three factors overbalance any inference based on the method of payment that the Company employs the men.

The question concerning the existence of an employer-employee relationship has not been squarely presented in any previous case before the National Labor Relations Board. *In the Matter of Budd Wheel Company,* Case No. R-5787 (September 17, 1943), the Board reviewed the prior cases and decided that the plant protection force there involved was an appropriate unit for purposes of collective

bargaining. However, the Board found that the "Company still hires and discharges the guards" and the situation is

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thus entirely different from that presented in this proceeding. Here the record clearly shows that the ultimate right to hire and fire rests with the army officers, *supra*, pp. 7 and 10, so that the *Budd Wheel* case is not applicable.

Another recent case involving plant guards is *In the Matter of Dravo Corporation*, Case No. R-5570 (August 30, 1943). The only reference in the opinion of the Board to the character of the relationship between the guards and the Company is the statement that "the wages and duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards." In the instant case Mr. Cyrus E. Wood, personnel director for the Company, pointed out that whereas the Company formerly employed six night watchmen it now pays over sixty auxiliary military police because of its war production (Tr. 88). The hiring, direction and firing of these new plant guards is no longer within the control of the company, *supra*, pp. 7-10, and it cannot reasonably be said that there has been no substantial change in this job as a result of the supervision of the military authorities.

The earlier decisions of the Board are all based on the fact that after the militarization of the plant guards the Company still had the right to discipline them, or to discharge them for cause, or to hire new guards. *Matter of Bethlehem Steel Company*, 46 N. L. R. B. 794 (January 6, 1943); *Matter of Johns-Manville Products Corporation*, 45 N. L. R. B. 33 (October 22, 1942); *Matter of Campbell Soup Company*, 45 N. L. R. B. 6 (October 22, 1942); *Matter of Chrysler Corporation, Highland Park Plant*, 44 N. L. R. B.

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881 (October 2, 1942). At the plant of E. C. Atkins and Company the Chief of the auxiliary military police disciplines the men (Tr. 67) and he is not subject to any direc-

tion by the Company (Tr. 69, 73, 90); the Company can only relieve a guard from duty temporarily (Tr. 58), and all discharges require the written approval of the District Plant Guard Officers, Captain Wetenhall (Exh. Company 10); army officers make the final decision with respect to the hiring of applicants for the job of auxiliary military police (Tr. 51, 95, Exh. Company 4). The previous decisions of the Board are therefore not in point. Since the federal government and not the army employs the plant guards, the Petition for Investigation and Certification of Representatives should be dismissed.

Finally, the purpose of the auxiliary military police is to prevent interruptions of production (Tr. 73). General Order No. 1 (Exh. Company 10) issued by Captain Wetenhall, specifically states that no conflicting interest of any kind will be permitted to interfere with the successful accomplishment of the guards' mission. Yet by its very nature unionization and collective bargaining between the representatives of the auxiliary military police and the Company may produce situations incompatible with efficient supervision of the work by the military authorities. A strike resulted at the Johnsonville, Pennsylvania plant of the Brewster Aeronautical Corporation because the union protested the assignment of guards to duty without regard to seniority rights (War Labor Board decision of September 25, 1942), and another recent War Labor Board case followed the demands of the union leaders of plant guards for a union maintenance contract at a war plant. (*In re*

Virginia Rubatex Division, Great American Industries, Case No. 111-476-R, August 27, 1943.) Similar union demands at the E. C. Atkins and Company plant would interfere with the broad control which the military authorities now exercise over the hiring, supervision and discharge of auxiliary military police.

II. THE TRIAL EXAMINER ERRED IN DENYING THE COMPANY'S APPLICATION FOR A SUBPOENA DUCES TECUM DIRECTED AT THE UNION LEADER TO PRODUCE THE MINUTE BOOK, MEMBERSHIP ROLL, APPLICATION CARDS, MEMBERSHIP CARDS, CORRESPONDENCE AND OTHER RECORDS RELATING TO THE PURPOSES, ACTIVITIES AND MEMBERSHIP OF I. A. M.

The chief obstacle to unionization of the plant guards involved in this case is the broad control which the military authorities possess over their activities. It is the contention of the Company that the demands of the union may conflict with the mission of the auxiliary military police in such a manner that production will be interrupted. In this connection the activities of this union in the other defense plants in which it has members (Tr. 37, 45) is material evidence, but the Company was prevented from introducing such evidence by the refusal of the Trial Examiner to grant its application for a subpoena *duces tecum* (Tr. 14). The record does not show whether the union has or has not demanded seniority rights, maintenance of membership contracts and other privileges which interfere with the protection of the defense plants. Likewise the records of I. A. M. contain the purposes for which Local 1683 is organized and if they are sufficiently definite, they might

show that it is attempting to organize employes of the United States, which is expressly prohibited by the National Labor Relations Act.

It is a well established principle of administrative law that the right to a full hearing implies the privilege of introducing all evidence which is competent, material and relevant to the issues and argument. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206 (1938); *Interstate Commerce Commission* v. *Chicago R. I. P. Ry. Co.,* 218 U. S. 88, 30 S. Ct. 651 (1909); *Ohio Bell Telephone Company* v. *Public Utility Commission,* 301 U. S. 292, 57 S. Ct. 724 (1936); *National Labor Relations Board* v. *Indiana and Michigan Company,* U. S.

Supreme Court, January 19, 1943. Refusal of an agency to issue subpoenas to a party to an administrative proceeding is merely one method of preventing him from introducing competent evidence. The refusal of the Trial Examiner to issue the subpoena requested by the Company, therefore, deprived the Company of a fair hearing and constituted a denial of due process under the Federal Constitution.

The Trial Examiner also admitted in evidence over the objection of the Company a "Statement of Field Examiner Concerning Claims of Authorization for the Purpose of Representation" dated September 11, 1943 (Exh. Board 4, Tr. 18). This is an important piece of evidence inasmuch as the Petition for Investigation and Certification of Representatives filed by I. A. M. should be dismissed if the I. A. M. does not have a substantial number of members in the plant. The Company, however, was not permitted to cross-examine the individual who made the statement or the data on which it was based.

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The material upon which an agency or other party proposes to rely as established fact, including the data upon which it is based, should be open for inspection by interested parties. The United States Supreme Court recognized this principle as early as 1912 when it said:

> "• • • All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." *Interstate Commerce Commission* v. *Louisville and N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 (1913).

The failure of the Trial Examiner to sustain the Company's objection to this secret evidence was material error and deprived the Company of a fair hearing. *Crowell* v. *Benson*, 285 U. S. 22, 52 S. Ct. 285 (1932).

Conclusion.

The Petition of I. A. M. for Investigation and Certification of Representatives of auxiliary military police should be dismissed.

Respectfully submitted,

Barnes, Hickam, Pantzer and Boyd,
Attorneys for E. C. Atkins and Company,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana.

Kurt F. Pantzer,
Lewis D. Spencer,
Of Counsel.

Filed October 11, 1943.

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APPENDIX.

BEFORE THE NATIONAL LABOR RELATIONS BOARD
For the Ninth Region

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and Its Affiliate, Local 1683, *Petitioner.*	Case No. 9-R-1200

MOTION OF E. C. ATKINS AND COMPANY TO DISMISS PETITION FOR CERTIFICATION.

Comes now E. C. Atkins and Company, one of the parties to this proceeding (hereinafter referred to as the "Company"), and moves to dismiss the Petitioner's Petition for

Investigation and Certification of Representatives herein for the following reasons:

1. E. C. Atkins and Company is not and cannot be an employer within the meaning of Section 2, Subsection 2, of the National Labor Relations Act with respect to auxiliary military police who wholly constitute the bargaining unit set forth in Item 4 of the Petition for Investigation.

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2. The employes referred to in the petition for investigation can not come within the definition of the word "employes" under the provisions of Section 2, Subsection 3, of the National Labor Relations Act with respect to the alleged employer, E. C. Atkins and Company.

3. The relationship of employer and employee with its various interests has never set in and is not existing at this time with respect to the auxiliary military police referred to in the Petition for Investigation and E. C. Atkins and Company.

Wherefore, E. C. Atkins and Company respectfully prays that the Petitioner's Petition for Investigation and Certification of Representatives be dismissed.

E. C. Atkins and Company,
By Kurt F. Pantzer,
Attorney.

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683, *Petitioner.*	Case No. 9-R-1200

APPLICATION FOR SUBPOENA *DUCES TECUM* DIRECTED AT F. M. RICHARDSON TO PRODUCE UNION RECORDS.

Comes now E. C. Atkins and Company, one of the parties to this proceeding, and respectfully applies for a subpoena *duces tecum* directed at F. M. Richardson, Business Representative, International Association of Machinists, District 90, and their affiliate, Local 1683 (hereinafter referred to as the "Union"), one of the parties to this proceeding, to produce the following documents:

1. Charter, Constitution and By-Laws of the Union;

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2. Minute book, membership roll, application cards, membership cards, dues books, bank book, check book, cancelled checks, correspondence and other records relating to the purposes, activities and membership of said Union;

in order that E. C. Atkins and Company may establish (a) the identity of the Union, within the purview of Section

2, subsection (5) of the National Labor Relations Act; (b) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains and chiefs," are "employees" within the purview of Section 2, subsection (3) of the National Labor Relations Act; (c) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains and chief," have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," within the purview of Section 7 of the National Labor Relations Act; (d) whether it is an unfair labor practice for E. C. Atkins and Company "to refuse to bargain collectively with the representatives of "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains and chief," within the purview of Section 8, subsection (5) of the National Labor Relations Act; and (e) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains and

chief," can properly be found to be a "unit appropriate for the purposes of collective bargaining," within the purview of Section 9, subsection (b) of the National Labor Relations Act.

E. C. Atkins and Company,
By Kurt F. Pantzer,
Attorney.

BOARD'S EXHIBIT 106.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

For the Ninth Region.

In the Matter of E. C. Atkins and Company, and International Association of Machinists, District 90 and Their Affiliate, Local 1683.	Case No. 9-R-1200.

PETITION OF E. C. ATKINS AND COMPANY FOR RECONSIDERATION OF DECISION AND DIRECTION OF ELECTION DATED OCTOBER 19, 1943, AND ORAL ARGUMENT THEREON BEFORE THE FULL BOARD.

E. C. Atkins and Company, the employer involved in the above-entitled proceeding, respectfully shows the National Labor Relations Board that:

1. On October 19, 1943 the National Labor Relations Board, hereinafter referred to as the Board, entered its Decision and Direction of Election in this case.

2. One of the material issues therein is whether the relationship of employer and employee exists between the plant guards involved (hereinafter referred to as auxiliary military police) and E. C. Atkins and Company (hereinafter referred to as the Company) under the definition of "employer" in Section 2(2) and "employee" in Section 2(3) of the National Labor Relations Act.

3. The Decision and Direction of Election referred to above fails to discuss or consider in any manner the facts proved at the hearing with respect to the peculiar incidents and status of employment of the auxiliary military police, merely concluding that they are "plant guards, who are all

auxiliaries of the military police" although the bulk of the 98-page official transcript and the 23 exhibits presented by the Company at the hearing deals with the peculiar incidents and status of employment of the auxiliary military police in great detail, differentiating therefrom "employees" as defined in the National Labor Relations Act.

4. The official transcript and the exhibits of the Company conclusively show that the auxiliary military police are hired by army officers, are supervised and controlled by army officers, and are discharged by army officers.

5. If the Board in its Decision and Direction of Election had found the facts incontrovertibly proved by the Company at the hearing, it would have been unable to conclude, as it did, "that the relationship of employer and employee still exists" or ever did exist between the auxiliary military police and the Company.

6. If the Board in its Decision and Direction of Election had found the facts incontrovertibly proved by the Company at the hearing, the inapplicability of the three prior decisions relied upon by the Board would be obvious.

7. The Board erred in concluding that the auxiliary military police were employees of the Company.

Wherefore, the Company prays that the Board reconsider its Decision and Direction of Election dated October 19, 1943 and grant the Motion to Dismiss the Petition for Certification made by the Company at the hearing. The Company respectfully requests permission to argue this petition before the full Board in Washington in support of said prayer.

Kurt F. Pantzer,
Attorney for E. C. Atkins and Company.

MEMORANDUM IN SUPPORT OF PETITION.

The 98-page official transcript and the 23 exhibits presented by the Company at the hearing were analyzed in the brief filed by the Company on October 11, 1943. The following summary indicates the facts proved at the hearing

and ignored by the Board in its Decision and Direction of Election dated October 19, 1943.

Duties of Plant Guards. The mission of a guard force of Auxiliary Military Police is to provide interior and exterior protection of the plant against sabotage, espionage and natural hazards and to serve with the Army in providing the protection to the plant and its environs in emergency situations. (Exh. Company 4, Tr. 35.) In this respect their general orders while on post are identical in wording and substance (Exh. Company 11) with those of a sentinel of the regular armed forces on guard duty as prescribed by the Basic Field Manual, Soldier's Handbook (Exh. Company 13). Specifically, their duties include directing traffic, escorting visitors, watching the gates and entrances, transporting cash within the plant, observing production workers, and other activities designed to prevent interruption of production (Tr. 21). They wear uniforms (Tr. 20), carry guns (Tr. 20), and salute army officers (Tr. 64). Their identification cards are issued by the War Department (Exh. Company 3, Tr. 27) and such cards differ materially from those issued to ordinary employees by the Company (Exh. Company 21, Tr. 94). The plant guards are given weekly instruction in the use of clubs and fists, pistol marksmanship, military courtesy, methods of arrest, control and prevention of fires and similar topics by army officers (Tr. 30, 71).

Hiring of Plant Guards. Army officers determine whether an applicant will be hired as a plant guard after they have made an independent investigation of his capacity, integrity and patriotism (Exh. Company 4, Tr. 35, 51, 95). Each plant guard enters into a contract of employment with the United States of America (Exh. Company 2, Tr. 35) and receives a "Certificate of Enrollment" signed by Lieutenant Colonel Rasmussen of the United States Army (Exh. Company 6, Tr. 55).

Supervision and Control of Plant Guards. Within each individual plant the Chief of the plant guards supervises their work and determines the shifts they work (Tr. 70), makes promotions (Tr. 67, 77) and has charge of discipline (Tr. 67). The Chief and his men are not subject to the

orders of the Company's officers or other employees (Tr. 69, 73, 90, 91). The Chief in turn receives his instructions from the army officers (Tr. 59, 63, 79). All members of the guard force are subject to the Articles of War (Exh. Company 9, Tr. 60) and may be court-martialed or otherwise punished for violations thereof (Exh. Company 10, Tr. 62). Their work is controlled by the General Orders issued by army officers (Exhs. Company 10, 11, 12, Tr. 62).

Discharge of Plant Guards. Dismissal of a plant guard requires the written approval of the army officer in charge (Exh. Company 10) and the Company does not have authority to discharge a plant guard permanently (Tr. 58). Upon termination of a plant guard's employment the army awards him a "Certificate of Meritorious Conduct" (Exh. Company 7, Tr. 57) unless he is discharged for misconduct, in which event only a formal release from his agreement with the United States Government is issued (Exh. Company 8, Tr. 58).

If the Board in its Decision and Direction of Election had included the facts established by the record and set forth above, it would have been unable to conclude, as it did, "that the relationship of employer and employee still exists" or ever did exist between the auxiliary military police and the Company. The interpretation of the National Labor Relations Act in this respect was recently considered by the Ninth Circuit Court of Appeals in *Hearst Publications, Inc. et al.* v. *NLRB* (June 10, 1943), 7 Labor Cases par. 61,659 (Cert. applied for, U. S. Supreme Court, Sept. 9, 1943 and granted Oct. 25, 1943). Judge Stephens held that the term "employee" should be given its ordinary and conventional meaning as developed under the common law and statutory enactments. The following language from the opinion is significant:

> "Since the term 'employee' is not defined in the Act, we agree with petitioners' contention that it must be given its conventional meaning as developed under the common law and statutory enactments. Such a result is in accord with the basic theory of statutory interpretation that the legislature is presumed to use words in their ordinary sense unless that sense is con-

tradicted by the context of a statute. *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560; *Kepner* v. *United States*, 195 U. S. 100, 124; *Levy's Lessee* v. *M'Cartee*, 10 U. S. 47, 49; *Commissioner* v. *Plestcheef* (CCA 9), 100 Fed. (2d) 62, 64. Since the principle is a long established one, it would seem that if Congress had intended to enlarge upon the common meaning of 'employee,' it would have specifically so stated in the Act, which sets out specific definitions to several terms used in the Act.

• • • • •

"The term 'employee' has been interpreted under several federal statutes, other than the National Labor Relations Act, in like manner based upon a broad policy of public benefit. In connection with the Federal Employers Liability Act (45 USCA § 51) the Supreme Court stated:

> 'We are of the opinion that Congress used the words "employee" and "employed" in the statute in their natural sense, and intended to describe the conventional relation of employer and employee.'

Robinson v. *Baltimore & Ohio Rr. Co.*, 237 U. S. 84, 94. In accord: *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 479. In connection with the Social Security Act (42 USCA § 1004) this court asserted:

> 'However, in defining the required relationship, and in drawing the distinctions between an employee and an independent contractor, the regulations (defining an employee as one who is subject to the control of his employer with respect to what shall be done and as to how it shall be done) do no more than reiterate the familiar principles of the common law.'

Anglim v. *Empire Star Mines Co.* (CCA 9), 129 Fed. (2d) 914, 917. In accord: *Jones* v. *Goodson* (CCA 10), 121 Fed. (2d) 176; *Texas Co.* v. *Higgins* (CCA 2), 118 Fed. (2d) 636. A similar result was reached in connection with the Merchant Marine Act (46 USCA § 688), *Loe* v. *Goldstein* (CCA 9), 101 Fed. (2d) 967, and with the Federal Safety Appliance Act (45 USCA

§ 11), *Stevenson* v. *Lake Terminal R. Co.* (CCA 6), 42 Fed. (2d) 357.

* * * * *

"The question for decision as to each newspaper separate from any other paper is whether there is substantial evidence that the publisher exercises, or has the right to exercise, sufficient control over the activities of the newsboys defined in its appropriate unit to support the Board's decision that they were employees under § 2 (3) of the National Labor Relations Act."

Under the rule set forth in the *Hearst Publications Case*, the question for decision in this proceeding is whether there is substantial evidence in the record that the Company exercises, or has the right to exercise, sufficient control over the activities of the plant guards to support the Board's decision that they were employees under § 2(3) of the National Labor Relations Act. The Decision and Direction of Election of the Board refers to no such evidence and in truth there is none. On the contrary the record affirmatively shows that the Company does not hire the plant guards, cannot control or supervise their work and does not discharge them.

The Board in its Decision and Direction of Election relied on its former decisions in *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973 (June 15, 1942); *Matter of Chrysler Corporation, Highland Park Plant*, 44 N. L. R. B. 881 (October 7, 1942); and *Matter of Dravo Corporation*, 52 N. L. R. B. No. 12 (August 30, 1943). In the *Phelps Dodge Case* the company contended that the plant guards were a part of management, and therefore not employees within the meaning of the Act, a contention entirely different from the question presented in the present proceeding. The effect of the militarization of the plant guards on the employer-employee relationship was not discussed in the opinion. It is difficult to see, therefore, how this decision has any bearing on the present question of whether the Company has relinquished so much of its control over its plant guards to the Army that the relationship of employer and employee does not exist within the definition of those terms in the Act.

In the *Chrysler Case* the Board stated in its opinion:

> "The employer's right to discharge for cause remains. Hiring, compensation for services performed, and general working conditions remain matters to be adjusted between the employer and employees through the usual employment contract."

In the present case the record clearly shows that the Company may not discharge a plant guard but may only relieve him of his duty temporarily (Tr. 57, 58). Also, hiring is not a matter to be adjusted between the employer and employees since the army officers determine whether an applicant will be hired (Tr. 51, 95). General working conditions are determined by the plant guard Chief (Tr. 67, 70, 77) who is responsible to an army officer (Tr. 59, 63), not to the Company (Tr. 69, 73, 90). The employment contract which the plant guard signs is with the United States of America (Exh. Company 2, Tr. 25). In all these respects the situation in the present proceeding is different from that in the *Chrysler Case*, which accordingly has no application in the present proceeding.

In its Decision and Direction of Election the Board placed its principal reliance on the *Dravo Case*. In connection with the appropriate unit the union argued in that case that the fact the guards are sworn into reserve membership in the armed services was no reason for segregating them from other employees, whereas the company urged that this should prevent these employees from being represented by any union which represents any other category of personnel employed by the corporation. In deciding this *sole* issue the Board *incidentally* remarked that "the wages and duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards." The issue of whether the employee-employer relationship was present was thus not squarely presented or adequately considered. The finding of a "proximate relationship of employer and employee" is certainly not the interpretation of the Act contemplated by the Circuit Court of Appeals in the case of *Hearst Publications, Inc. et al.* v. *NLRB, supra.* And as

the Company pointed out in its original brief, it cannot reasonably be said in the present case that there has been no substantial change in the peculiar incidents and status of the relationship as result of supervision by the military authorities since the hiring, direction, supervision and discharge of the plant guards is no longer within the control of the Company but is handled by the army officers.

In conclusion, it is the contention of the Company that whether an employer-employee relationship exists under the National Labor Relations Act depends upon the common law meaning of those terms. *Hearst Publications, Inc. et al.* v. *NLRB, supra.* At common law the incidents of the employer-employee relationship were the hiring, control, and discharge of the employee by the employer. *Hearst Publications, Inc. et al.* v. *NLRB, supra; Bowman* v. *Pace Co.*, 119 F. (2d) 858 (CCA 5, 1941); *Williams* v. *United States*, 126 F. (2d) 129 (CCA 7, 1942); *Texas Co.* v. *Higgins* (CCA 2, 1941); *Mid-Continent Petroleum Corporation* v. *Vicars*, 47 N. E. (2d) 972 (Indiana Supreme Court, 1943). These cases are fully discussed in the Company's original brief. In the present case the employer-employee relationship between the Company and the plant guards does not exist because the army officers hire the plant guards, control and supervise their work, and determine when they shall be discharged.

Conclusion.

The Board should reconsider its Decision and Direction of Election dated October 19, 1943 and should dismiss the Petition of the International Association of Machinists for Investigation and Certification of Representatives of auxiliary military police.

Respectfully submitted,

Barnes, Hickam, Pantzer and Boyd,
Attorneys for E. C. Atkins and Company.

Kurt F. Pantzer,
Lewis D. Spencer,
Of Counsel.

Dated October 28, 1943.

Filed October 29, 1943.

1 THE UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

E. C. Atkins and Company,

and

International Association of Machinists, District 90, and Their Affiliate Local 1683, affiliated with the American Federation of Labor.

Case No. 9-C-1982.

815 Connecticut Ave. N. W.,
Washington, D. C.
May 11, 1944.

The above entitled matter came on for oral argument pursuant to notice at 10:30 a. m.

Before:

Gerard Reilly, Presiding.
John M. Houston, Member.

Appearances:

Kurt F. Pantzer, 1313 Merchants Bank Building, Indianapolis, Indiana, appearing on behalf of the Company.

L. O. Thomas, Machinists Building, Washington, D. C., appearing on behalf of the Union.

2 PROCEEDINGS.

Mr. Reilly: The Board will now hear oral argument in the E. C. Atkins and Company case, file No. 9-C-1982. The case is here on Respondent's exceptions to the Trial Examiner's Report. Mr. Pantzer, are you representing the Respondent?

ORAL ARGUMENT OF MR. KURT F. PANTZER.

Mr. Pantzer: If it please the Board, this case is here on exceptions filed to the Examiner's Report finding that the company is guilty of an unfair labor practice in failing to bargain with the Machinists Union who have been organized. The location in dispute in this case is therefore the Indianapolis location.

One of the plants is the South Illinois Street plant in which the company prior to the war manufactured principally saws. That plant is owned by the company. The other plant is the Fall Creek Ordnance plant, the land and buildings of which are owned by the government and then leased to the company in order to ensure production space for the manufacture of armor plate. The company has had pleasant relations with the unions representing its employes in the past, and we have, may it please the Board, repeatedly stated at the hearings, both in the representation case and the unfair labor practice case that we intend to have friendly relations with this union when, if and as this rather technical point which we are raising, and on which I understand the mind of the Board is fore-
3 closed, has been finally decided. Mr. Richardson, the organizer for the Machinists in Indianapolis is a grand person and no better counsel for the organization could be found.

Mr. Reilly: We have before us the same question that was raised in the representation case with regard to this unit of guards, and it is your position that this case is distinguishable in any respect from the Dravo case or the Yellow Truck & Motor Coach case or is it your position that those cases should be overruled?

Mr. Pantzer: Well, in the first place, may it please your Honor, we take the position that so far as the facts stated in your opinions in the Dravo case, the Phelps-Dodge case, the Aluminum case and the Truck case are concerned you have not considered, so far as the opinion goes, the facts which are pregnant in this record. In addition we claim that those cases should be overruled.

Mr. Reilly: Yes.

Mr. Pantzer: Now, we do not have available in Indianapolis records in those cases and I have never had one of my assistants come to Washington to examine them. I do not know whether they would be available for such an examination. Now, does that state our position clearly?

Mr. Reilly: I notice in your brief you rely also in part upon the Court of Appeals decision in the Hearst Publications case. You were aware that that decision was reversed recently by the Supreme Court?

Mr. Pantzer: Very much aware.

Mr. Reilly: Yes.

Mr. Pantzer: But we again feel that if it was a question of fact which was decided in the first case that there must be a question of fact decided in this case. The facts in the Hearst case are in fact so different from the facts in this case that except for the one ruling that this Board can *ex cathedra* find that the relationship of the employer-employe exists in fact and which at common law did not exist, the Hearst case has no application to this case. Now, we do, however, want a thorough reconsideration of the principles of agency law in this particular case to the extent that administrative expediency warrants it.

Now, we have had, at that plant, continuous friendly relations with other unions. We, for instance, have had a closed shop saw smiths union for 40 years, one of the oldest guild unions in Indianapolis. There are 59 saw smiths, additional apprentices and by an order of this Board entered a year and a half ago in another representation case, not to be confused with this case, it was held that the press-brake operators who help straighten armorplate belong within the jurisdiction of the saw smiths closed shop union, rather than the C. I. O. union shop union. The C. I. O. Union has been with us since 1937 and represents some 2,000 production employees in the two Indianapolis units and is, as I have stated, a union shop. In connection with our negotiations with both of those unions it was expressly agreed that watchmen would not be a part of the bargaining unit. Before we took on army work we had from four to six watchmen. When

we switched over to war contracts, first in the South Illinois Street plant and subsequently after the government had constructed and leased to us the Fall Creek Ordnance Plant, we were required to maintain 64 military police and pay their wages. The record shows that the government required us to pay their wages. That does not appear, as I read any one of the other cases, in your other records.

Now, that is the sole incident, the sole conventional incident, of the relationship between employer and employee that exists in this case.

Mr. Houston: Do I understand your position,—this is a little bit different to what Mr. Reilly asked you,—that these men you claim are under the jurisdiction of the War Department, and the only connection you had with them was to pay their wages?

Mr. Pantzer: That is right. And the only relationship upon which this Board can base a finding that the employer-employe relationship existed is that sole incident of wage pay. The wages are, as the record shows, as we brought out in our own testimony, paid by checks of E. C.
6 Atkins & Company; but as does not appear in the other records the clauses in our military contracts require us to maintain these auxiliary military police at our expense or we don't get the contracts and as the Chief of the Military Police explained on the stand we are required to pay those wages by the government. Now, no other incident of the employer-employe relationship exists here. The right to hire does not exist. The right to fire does not exist. The right to discipline does not exist. The right to instruct and to command obedience with respect of the details of carrying out a plant guard's work does not exist. The right to consider grievances on the part of plant guards does not exist. There is absolutely no right of seniority based on length of service. The right of promotion is inherent in the armed forces in Cincinnati, Ohio, as the record shows. The right of demotion springs from Cincinnati, Ohio. With the sole exception of the incident that technically the check comes from them, no other incident of the relationship of employer-employe as we know it at common law or under any other decision pursuant to

statute which can be called to attention exists in this case. In other words, if the Board finds upon the facts in this case that the employer-employe relationship exists it does decided violence to the facts, and understand, your Honors, I respect your other decisions. I have other clients in Indianapolis, for instance, organized by the Air Force. In the case of those clients the plant guards have never taken
7 the oath of office as a soldier in the Auxiliary Military Police. They are not subject to court martial. Their employment is finally made and their discharge is finally made by the employer and their wages are paid by the employer. Promotion may be made according to seniority or according to ability or according to any other arbitrary criteria that the employer desires to follow.

Mr. Houston: In your case, how are these men engaged, who engages them and who handles grievances, and are they promoted and who discharges them?

Mr. Pantzer: With respect to the most instances, sir, with respect to the method of hiring and firing,—hiring may be made in the first instance by the War Department as may firing; but generally hiring is in the first instance initiated by the employer. No one of the 64 plant guards was ever an employe of the company before the taking on of war work and the signing of the contracts with the government to maintain the Auxiliary Military Police as watchmen for the government in the plant.

The application for employment is signed in the Personnel Office of the company. It is then forwarded and the man is put to work on probation. The application is then forwarded to Cincinnati and an F. B. I. man investigates the record of the employe thoroughly and finally after an investigation made upon that recommendation of hiring by the Personnel Director, the man is either engaged
8 or dismissed. If he is engaged he then signs the contract with the government which also existed in the Aluminum case, swears the oath of office to support the military and to be governed by the Army Regulations, and is issued his commission in the Military Police, a photostatic copy of which is in the record. He is issued his identification card signed by the Major in Cincinnati, not

an identification card signed by the Personnel Department of the Atkins Company, and is solely subject to the rules and regulations of the police.

Now, in that respect, Mr. Thomas, your Mr. Gann who went on the stand first, bore out our contention just as completely as our witnesses did.

I want to call the attention of the Board to the one possible misunderstanding in the record. The Union's witness, Mr. Gann said that with respect to general orders for performing work, the orders of the military in Cincinnati were paramount but with respect to special orders for performing work the order of the "company," were paramount. We were amazed at that testimony. It developed on cross-examination that what he meant was the "military company of military police" which has a Lieutenant Scanlon in charge of it in Indianapolis. So the first two or three times you come across the word "company" in the record don't be misled by coming to the conclusion that that means the employer. It means the Military Police Company as his cross-examination amply shows.

Now, with respect to firing, a recommendation from the company will also be considered but final firing is done from Cincinnati either by means of an Honorable Discharge Certificate which you will find in the record, or a Dismissal for Cause which is not a certificate but a more informal document, something like a letter, a copy of which you will also find in the record.

Mr. Reilly: I can understand, of course, why the company could not sever their military status, if that should be required by reason of this oath, but suppose that there was some guard whose conduct and character was so flagrant that they wouldn't want to have him around the plant and while it is true the company's action, as I say, wouldn't sever his military status, wouldn't it effectively terminate any connection he had with that plant?

Mr. Pantzer: Well, I am coming to that. You are bringing up the one sore spot, my one complaint about the two hearings. I received the most courteous consideration of Trial Examiner Shroyer in the first case and Trial Examiner Persons in the second case, the Unfair Labor Practice case, except that both of them denied my request for

subpoenas duces tecum to have the union, which is a local, organizing not merely the Atkins plant but a union organizing as well the Marmon-Herrington plant, the Curtis-
10 Wright plant, the Mertz Engineering plant and I believe one other plant (a tool and die manufacturing company plant)—to have the union bring into the hearing its existing collective bargaining agreement with those four plants in order that we might show that the nature of the union relationship ran completely counter to the relationship imposed by the military authorities in Cincinnati upon our plant guards. Now, the only way in which I can show to your Honors that the relationship could not exist,—and I think it was to that your question was directed,—am I right?—

Mr. Reilly: That is right, yes.

Mr. Pantzer: —If we read from the proposed collective bargaining agreement submitted by the union,—now, I am not going to read it at length. Let me merely summarize certain of the clauses and your assistant can then see whether or not my statements are honest.

Mr. Thomas: Is that an exhibit in the case?

Mr. Pantzer: That is an exhibit in the case. In other words, Mr. Richardson, the record shows submitted to us a proposal for collective bargaining a copy of which I have in my hand and that's an exhibit in the unfair labor practice case. I do not have the number but I know you can find that, Mr. Thomas.

In the first place, the union asks for a union shop effective on 30 days after employment and demands thereafter that we dismiss non-members. We have no power to
11 dismiss these employes, from our services,—any employes who have not joined the union. Now, you may say that possibly we could have negotiated so as to avoid a union shop, but Mr. Richardson, the union organizer, testified that three of the four plants under his organization had union or closed shop contracts. In the second place, the proposal specifies: "It shall be the duty of the shift committeeman to take up with the proper company officer grievances or suggestions from employes on his shift or crew," and also states that representatives of District No. 90 and the International Union may be present at all,—

"at any or all of the meetings for the purpose of collective bargaining or the handling of grievance matters." That is almost the situation in the Russian Army but not yet the situation in the American Army. In other words, the testimony shows that the Army has the absolute right to discipline those employes. There isn't any question about it in the record. Now, whatever the facts may be, Sir, in your Aluminum Company record, or in your other records, or in the Hearst case with respect to denying a newsboy or denying a plant guard, respectively, the right to work, the company doesn't have it. That inheres in the military authority and we have no right to make a contract binding the military authorities in that respect. You can understand how that would completely destroy military discipline.

Mr. Reilly: I notice the record indicates the disciplinary powers of the military officials with regard to these
12 men. I thought there might be concurrent power on the part of the company but you feel that the record doesn't lend any support to that theory?

Mr. Pantzer: I do not, except in an advisory manner with respect to hiring and firing. There is no finding that there is any advisory authority on the part of the company to promote employes, to demote employes. Those promotions and demotions came from Cincinnati or were made by the Chief of the Military Police on the spot, without any consultation whatever with the Personnel Department of the company.

Mr. Houston: On grievances, do they take that up with the Personnel Department of the company?

Mr. Pantzer: They have no grievances in the army. You are lucky if you get to salute your company commander, and the record so shows. In other words, if the Army is wrong it's right. There is no National Labor Relations Act unfortunately, in the Army. I was in the last war and I think there should be some sort of grievance procedure but not the Russian kind.

Mr. Reilly: Then it is your position that these men are employes of the War Department? Is that correct? Did you read in the Dravo case that statement prepared jointly by the War and Navy Departments with regard to their views of the legal status of these armed guards?

Mr. Pantzer: In other words, that there may be collective bargaining?

13 Mr. Reilly: Yes. There is reference to it in the decision. I am not sure that it is set out in full. I remember it was included in an exhibit.

Mr. Pantzer: Now, Mr. Reilly, I hope that when that order is taken judicial knowledge of in this case, because it is not in the record—

Mr. Reilly: Yes, I understand that.

Mr. Pantzer: —That the Board will honestly put into the record the date of that order, because the date of that order is antecedent to the orders 1, 2, 3 and 4 which are in the record in this case, and your Dravo case was decided before this more thorough organization of the Auxiliary Military Police under the Ordnance Department, not the Aircraft Department, the Lease Lend Department or the Navy Department, in Cincinnati, through its Civilian Security Service headed up by a major and captains and lieutenants.

Mr. Reilly: Your feeling is that even though your earlier arrangement made by the Army and Navy may have been such as to retain the relationship of employer-employe with regard to these men so far as companies were concerned that the arrangements they made in Indianapolis were so different that we have got to examine these documents alone and decide whether there is an employer-employe relationship?

Mr. Pantzer: Precisely.

14 I concede, your Honor, that perhaps the Dravo case may be right on its facts though none of the facts on my side of the case are noticed in the Dravo case, because the Dravo plant was not organized as our plant was. Consequently, that ruling of the War Department related to the rather loose supervision of plant guards who were nothing more than watchmen in the Dravo plant. In other words, I maintain that had the union sought to organize our six watchmen before the government took it over we would have had the Dravo case in the Atkins situation.

Mr. Reilly: Yes.

Mr. Pantzer: Now, going back to the contract you will note that the contract violates very clearly the orders which

are in evidence. It provides that rights to promotion, preferences as to shifts, and the right to remain in the service of the company in case of reduction in force, shall be governed by seniority. Now, it develops that the military authorities following the Manual of Guard Duty started an entirely different shift system with respect to these guards than we have in our plant. Our plant is run on fixed shifts. The year round a man works on the graveyard shift and doesn't rotate. These, according to the military service, rotated in eight hour tours of guard duty. Furthermore, you will find, as the record illustrates that the orders which they swore to carry out are identically the same, through order No. 12 of the orders of an
15 infantry soldier on guard duty under the Manual of Interior Guard Duty, photostatic copies of the proper pages of which are in evidence in this record.

Now, under that it would be absolutely impossible for the employer to promote or demote or give preference as to shift according to seniority. The Chief of the Military Police, may it please the Board, testified specifically that the right of promotion, the right of discipline, depended entirely upon the ability and performance of the man.

Mr. Houston: He determines that himself, doesn't he. I mean the chief?

Mr. Pantzer: The chief.

Mr. Houston: Yes.

Mr. Pantzer: The chief, who is frequently visited by Captain Westenall from Cincinnati and Lieutenant Scanlon from Indianapolis.

Mr. Houston: Yes, I understand that, but no member of the company has any voice in the matter?

Mr. Pantzer: No member of the company. The testimony was uncontradicted that these police have the right to arrest officers of the company, to discipline officers of the company, to keep them from walking around in their own plants. This was entirely under the jurisdiction of the military authorities. And this contract provides that "the management of the plant and the direction of the work-
16 ing forces, including the right to hire, suspend or discharge for proper cause, or transfer and the right to relieve employes from duty because of lack of work or

other legitimate reasons is vested exclusively in the company." I assume that some of those other contracts were like that, and they may be plants which were under the jurisdiction of the air force at the time the contracts were made, in which none of this military legerdemain (if the Board chooses to look at it as legerdemain, and it certain is not legerdemain) was enforced.

Now, I have taken up my half hour. I hope I have impressed the members of the Board with my sincerity in believing that the incidents of the employer-employe relationship, as those words are used in the statute, do not exist in this case except with respect to the sole technical incident that the pay actually comes from the company. But when you realize that the company is merely a conduit of that pay, made to pay it as a result of the contracts of the government (contracts which it was impossible to introduce in evidence because of the confidential nature of the product covered thereby). It will be seen that it is merely a technical incident and that in substance it is the government which is the paymaster of these troops.

Mr. Reilly: Just one more question. Are their wages fixed by some scale that appears in an Army manual or are they fixed by the company so far as any company has control of the situation under the regulations under the War Labor Board?

Mr. Pantzer: Will you ask that question again, please?

Mr. Reilly: Yes. In fixing the wage rates for the guards do you have to conform to some standards in the Army or War Department Manual?

Mr. Pantzer: The record shows that in fixing their original wage rates which as I understand have not been increased since, (and I interpolate now because the record doesn't show it but the wage rate of the saw smiths in the Saw Smiths Union and the C. I. O. employes in the C. I. O. Union has also not been changed for two and a half years, which well covers the period since when the Plant Guards came into the plant)—they were initially fixed by a Form 10 application addressed to the National War Labor Board and we put that evidence into the record.

Mr. Reilly: Yes.

Mr. Pantzer: In other words, we have been fair in presenting all the facts.

Mr. Houston: I don't know whether this is a relevant question or not but I want to ask it. Do you operate on a cost-plus basis on your contracts with the government?

Mr. Pantzer: No, we do not operate on a cost-plus basis. We have never been on that basis and the company is not in the best financial condition at this time for that reason.

It may interest you that a little later in the day I
18 am to discuss with representatives of the War Labor Board the matter of this steel base as it affects the Atkins Company.

Mr. Houston: Yes.

Mr. Pantzer: The 17 cent wage increase and the guaranteed weekly wage, and so forth. But that, of course, won't affect these plant guards because they are not in the C. I. O. Steel Workers Union.

Mr. Reilly: Mr. Thomas.

Oral Argument of Mr. L. O. Thomas.

Mr. Thomas: May it please the Board, I notice argument phases brought out by Respondent's attorney a repetition of arguments that are already in the record. I have not been able to distinguish anything new at all and I just want to leave this thought that even granting the assumption that the Army of the United States has made an exception in this one case and has special rules surrounding this one particular plant, that even so they have left certain matters which are the subject of collective bargaining and wages. If that were the only thing that were left it would still be a matter for collective bargaining and to that extent, at least, these individuals would be employes under the Act. The fact that the union made certain proposals as subjects for collective bargaining doesn't seem to me to be relevant at all in view of the fact that they are subject to collective bargaining and certainly if the company is precluded from arriving at a certain agree-
19 ment the union would have to recede from its particular position. Now, the fact that if this case is as

you would be inclined to believe, from the remarks of counsel, it is the only case in the country in which this particular situation exists, which the union doubts, then we would be very much interested in that. We have many contracts with concerns covering militarized guards who have to take an oath in the army, who have to submit to F. B. I. investigation and who are completely under the supervision of the army to the same extent they believe as the guards in this case.

Mr. Houston: And are still paid by the employer?

Mr. Thomas: And are still paid by the employer. And even in the record, the documentary arguments, the point isn't raised so fine as it is here today, removing the company from the control of this force in many respects. I didn't get out of the record and the pleadings that clear a distinction. I got the fact that many things were subject to the supervision of the military forces and I think that that is just and right. The company in the first place, however, entered into the agreement with the United States in which this was a clause. It was a voluntary proposition on the part of the company and I don't think that the military or the company, either one, can enter into a contract and deprive an individual of a right under an Act. These men are not part of the armed forces in the true sense of the word. They can be called out the same as any police official to subdue local riot or something like that. So can a guard with a deputy sheriff's badge so they are not subject to call to any foreign service. They haven't obligated themselves to be called to a training ground and shoulder a rifle. They have obligated themselves to watch this plant and to follow the military rules that are set up for that purpose. And I can't believe, nor do I think the Board can believe, that the military is any more concerned about the guarding of that particular plant than it is the large aircraft plants throughout the country.

Mr. Houston: Is there any distinction between these particular guards in this plant and any other militarized or aircraft factory?

Mr. Thomas: Not to the Union's knowledge. That, of course, as a matter of fact would have to be established

from the record but to the Union it seems unique that there should only be one place in the country where they cease to be employes when they are considered by the army which has already issued regulations to that effect, stating wherein it is possible for those people to bargain collectively. The only requirement that they make is that they not be a party or part of the same lodge that the production and maintenance employes are, that they have a separate union of their own, all of which has been carried out meticulously in this case as counsel's remarks would indicate. There is a Guards Lodge in the City of Indianapolis. Nobody is eligible to it except those
21 who are guards. I don't know whether it is in the record or not, but I make the statement and we are willing to substantiate it with exhibits, to the effect that we have contracts, plenty of them, covering militarized guards. Now, the rest of it probably would be the same as my colleague, Huhndorff, I agree whole-heartedly with—

The Chairman: Do you have any more?

Mr. Thomas: I should like to say one sentence. I should like to ask of the Board that it take judicial knowledge of any public records which it has in the form of directions and decisions of election or orders in unfair labor practice cases with respect to the four or five other plants which this local Machinists Union has under organization in Indianapolis, in order to establish whether or not any contest of the existence of the employer-employe relationship was made by employers in those cases.

Mr. Reilly: Does the record indicate the names of those?

Mr. Thomas: Yes, I mentioned three of them just a moment ago.

Mr. Reilly: Then we can check them.

Mr. Thomas: Check them against your record and find out whether any contests were made. I understand that consent elections were held in those cases or recognition made without even an election.

22 Now, I have been unable to run the cases down in my services in Indianapolis. I have found nothing which runs counter to my statements. I therefore ask you to take judicial knowledge and if you find any facts that

run counter to my observations—I am not stating them as a matter of fact because I don't know the ultimate facts,—but you cite them in your opinion.

Mr. Reilly: Yes.

Mr. Thomas: There is a standard clause that takes care of any army regulation as they affect a collective bargaining agreement. In other words, it says if there are any army regulations to the contrary they are controlling. If Mr. Pantzer would give the dates of these orders that counsel was curious about.

Mr. Pantzer: Well, let me be fair to Mr. Thomas, who is not conversant with the record. In the proposal of the union, Mr. Thomas, from which I read just a few minutes ago—

Mr. Thomas: That is in the record.

Mr. Pantzer: —in my direct statement,—appears an Article Numbered VIII bearing the heading 'War Department Regulations' reading as follows: "It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military organizations of the plant guard forces, W. D. Directive, July 2, 1942, A. G. 23 231.43; 808 circular (blank) 1942, and any amendments thereto, and that nothing contained in this agreement shall be construed in any way to interfere with the organization, efficiency, training and control by the War Department of the company guard force as an auxiliary to the Military Police nor to abrogate or interfere with the duties, responsibilities and rights imposed by the War Department upon any employe in such Auxiliary Military Police." You might as well not have a collective bargaining agreement with the proposals which I read in my direct statement as have that in the agreement. That is not collective bargaining if it means what it says. But I call attention to the dates of those orders which antedate by substantially a year the new system set up by the government with respect to the Auxiliary Military Police from Cincinnati out.

Mr. Reilly: Thank you.

Mr. Pantzer: The order to which I refer is dated May 10, 1943.

Mr. Reilly: Would you show the document to Mr. Pantzer and see if he has any objection to it. (Handed over to him.)

Mr. Pantzer: I have never seen this document. May I have a moment's time to consider it?

Mr. Reilly: Yes, indeed.

(Discussion off the record.)

Mr. Pantzer: I have glanced through the document which was handed me by Mr. Thomas and find it is a con-
24 formed copy of a collective bargaining agreement entered into between the Aircraft Accessories Corporation, Kansas City Division, including Slater, Missouri, and the Auxiliary Military Police and Guards Union, a subdivision of the International Association of Machinists. I have glanced through the various provisions therein contained and I should say ninety percent of them are entirely out of consonance with the material contained in the military order from Cincinnati. Now, it was a denial of my request for subpoena that prevented me from showing how out of accord with military discipline these three or four or five other contracts of this union, actually imposed upon and signed by the employers, were.

May I leave this with the Board, or do you want it for your files?

Mr. Thomas: Well, I will furnish you copies.

Mr. Pantzer: If he would send copies to the Board and to me I think it would be illustrative rather than in defeat of the point I make.

Mr. Reilly: Yes. I take it that there is no objection to our receiving it, is that right?

Mr. Thomas: No.

Mr. Pantzer: I have no objection to the Board's receiving and making an exhibit of the document, provided that Mr. Thomas will send a copy to me.

Mr. Reilly: Yes. That is understood.

25 (Discussion off the record.)

Mr. Reilly: On the question of the relevance it would seem to me that the real question in this case is whether the orders and contracts of the government applicable to this company are such that the government can

determine that the control exercised over them by the company is so continuous as to indicate that the employer-employe relationship did not exist so that while the collective agreement which you offered is of interest it wouldn't necessarily have any bearing on this point since the argument seems to be confined—

Mr. Pantzer: I think you were about to suggest, Mr. Reilly, that if it is made an exhibit I get to see it.

Mr. Reilly: Oh, yes, indeed.

Mr. Pantzer: And I want to call attention to the fact that it is a contract very obviously with an aircraft producing firm and none of the aircraft producing firms in our area, including Curtiss-Wright and so forth have had the military regulations enforced. Even today, in May 1944 that is so.

Mr. Reilly: Thank you, Gentlemen.

(Whereupon the oral argument was closed.)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the twenty-eighth day of September, in the year of our Lord one thousand nine hundred and forty-three and of our Independence, the one hundred and sixty-eighth.

8669

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY, RESPONDENT

On Petition for Enforcement Of an Order of the National Labor Relations Board

And, to wit: On the twenty-seventh day of February, 1945, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said opinion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh District

No. 8669. January Term, 1945, October Session, 1944

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY, RESPONDENT

On Petition for Enforcement Of an Order of the National Labor Relations Board

February 27, 1945

Before SPARKS, MAJOR and KERNER, Circuit Judges

MAJOR, Circuit Judge: This case is here on petition of the National Labor Relations Board for enforcement of its order issued May 30, 1944 against respondent, pursuant to Sec. 10 (c) of the National Labor Relations Act. The Board, upon a charge filed by the International Association of Machinists, District 90, and its affiliate Local 1683 (hereinafter called the Union), issued

its complaint charging that respondent had violated Sec. 8 (5) and (1) of the Act. In its answer to the Board's complaint, respondent admitted that it had refused to bargain collectively with the Union, as alleged in the complaint, but urged that members of the unit for whom the Union sought to bargain were not employes of respondent within the meaning of the Act, and that consequently its refusal to bargain did not constitute a violation. The Board decided adversely to respondent and entered its cease and desist order now sought to be enforced.

No evidence was offered by either of the parties at the hearing on the unfair labor practice charge; however, it was stipulated that the evidence which had heretofore been offered in a representation proceeding should be considered. In this latter proceeding, instituted by the Union on October 19, 1943, it was determined by the Board that the militarized plant guards at respondent's plants were employes within the meaning of the Act and that, excluding certain supervisory employes, they constituted an appropriate bargaining unit within the meaning of Sec. 9 of the Act. The Board accordingly directed that an election be held among the employes in said unit. Following the election, the Board on November 29, 1943, certified the Union as the exclusive bargaining representative for such employes.

The primary issue now presented, stripped of all camouflage, is whether the members of the unit for whom the Union sought to bargain were employes of respondent within the meaning of Sec. 2 (2) and (3) of the Act. It is also contended by respondent that even though the position of the Board be sustained in this respect, its order should not be enforced, on the ground that its enforcement would not effectuate the policies of the Act.

Respondent urgently insists that the findings of the Board are insufficient to support its order, and particularly that at no time has the Board made a specific finding on the issue as to whether the members of the bargaining unit are its employes within the meaning of the Act. While there is some merit in this criticism, it cannot be doubted but that the Board determined such issue adversely to respondent and that respondent was aware of such determination. Respondent also contends that the Board was without authority in the unfair labor practice case to make findings in addition to those made in the representation case. It is true, as already stated, that no additional evidence was offered in the latter case but, nevertheless, we are of the view that the Board, with the record of both proceedings before it, had a right to make such further findings as it deemed appropriate.

We are of the view, also, that the findings contained in its decision in the unfair labor practice case, if substantially supported, are sufficient to support its order. In studying this record for the

purpose of ascertaining if such support is present, we are not unmindful of the admonition so often repeated that a court is not permitted to weigh the evidence and substitute its judgment for that of the Board. As stated in the recent case of National Labor Relations Board v. Hearst Publication, Inc., 322 U. S. 111, 130:

"Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record."

The Hearst case is strongly relied upon by the Board. It is true that the issue there decided, that is, whether the members of the unit which sought the right to bargain were employes within the meaning of the Act, was the same as the issue in the instant case. The facts of that case, however, are so widely different from those of the instant case that it is of little, if any, assistance here. It is pertinent to note that the court was particular to point out in detail the vast amount of control which the publisher had over the newsboys in question. The court also recognized that many forms of service relationship are not within the meaning of the Act. It stated (page 126):

"Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand."

Therefore, we are of the view that the decision in the Hearst case requires rather than precludes a review of the facts in the instant case, with a view of ascertaining if they reasonably support the Board's order. Furthermore, we are of the view that common-law tests are not to be ignored, although not exclusively controlling, and that any test utilized must be consistent with the purposes of the Act.

Respondent is a corporation operating two plants in Indianapolis, Indiana. One of such plants (referred to as the Main Plant) has been owned and operated by respondent since 1857; the other (referred to as Fall Creek Ordnance Plant) is owned by the federal government and was constructed for war purposes. Respondent operates the latter under a lease from the federal government, the terms and conditions of which are confidential for military reasons. The latter is a military reservation, and the Main Plant is listed by the government as a restricted area under government supervision.

Since 1941, respondent has been engaged exclusively in the manufacture of armor plate for the federal government. Prior

thereto, it was engaged in the production of saws and saw tools at the Main Plant. At that time respondent had as its employes some fifty-nine sawsmiths who for a period of over forty years had been organized by and were members of the Sawsmiths Federal Labor Union No. 18548 (sometimes referred to as the Federal Local), and 1,208 production and maintenance employes who had since 1937 been members of United Steel Workers of America, Local 1543, affiliated with the C. I. O. (sometimes referred to as the C. I. O. Local). Respondent also had four employes, designated as watchmen, who were not members of any Union. Two of these employes worked on the night shift and two on the day shift. The duties of the former were to check the eighty-two night clocks in the plant, and those of the latter to watch or guard the gates of the plant. These four jobs were known as "pensioners' jobs."

The authority for the establishment of a plant guard system flows from Executive Order 8972, issued by the President of the United States on December 12, 1941. The order is entitled: "Authorizing The Secretary Of War And The Secretary Of The Navy To Establish And Maintain Military Guard And Patrols, And To Take Other Appropriate Measures, To Protect Certain National-Defense Material, Premises, And Utilities From Injury Or Destruction." The resolution, after reciting the situation pertaining to the crisis confronting the government as a result of war, states:

"Therefore, by virtue of the authority vested in me as President of the United States, and Commander-in-Chief of the Army and Navy of the United States, I hereby authorize and direct the Secretary of War, whenever he deems such action to be necessary or desirable, * * * to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities * * *."

It is to be noted that the purpose for which a plant guard system was to be inaugurated is clearly stated in this executive proclamation.

In conformity with such order, there was issued by the War Department under date of July 2, 1942, a proclamation entitled "Military Organization of Plant Guard Forces," which provided in part:

"Guard forces at all War Department plants * * * are to be organized, drilled and instructed as military units subject to the Articles of War.

"These guard forces will be organized as a civilian auxiliary to the Military Police in all ammunition plants and plants where the possibility of sabotage is greatest * * *.

"At the time any guard force is organized as a civilian auxiliary to the Military Police, the commanding officer having jurdisdiction over the guard force will:

"a. Cause the Articles of War prescribed by Article 110 thereof to be read and explained to each member of the guard force;

"b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

"c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises, and war utilities which the force is assigned to guard.

"d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subjected to military law as long as he remains a member of the guard force. (A draft of a form of such agreement is attached.)"

The form of agreement is entitled, "Agreement between the United States of America and _____"

(Plant Guard)

The proposed agreement states that the government is approving the employment of guards "for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers for violations of Federal laws, as well as for violations of orders and regulations issued by military authority." The proposed agreement then provides:

"Now, therefore, I, _____, who have been or am about to be employed by _____ as a guard at _____ for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

"(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

"(2) I will bear true faith and allegiance to the Constitution of the United States;

"(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers;

"(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of

my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

_____"

(Signature of Plant Guard)

At the time respondent entered into its relationship with the federal government for the manufacture of armor plate (the record does not disclose the exact date but it was sometime in 1941), representatives from the Cincinnati Ordnance Office of the United States Army made a survey of respondent's plant facilities and prescribed the requirements of the government relative to protection. As soon as contracts for the production of war goods were entered into between the Army and respondent, a clause was inserted, stating, "Unless proper protection of government property is provided, in compliance with certain directives, the contract will be cancelled." It was in compliance with this requirement that respondent entered into a relation with those whom the Board has found to be its employes. A staff of sixty-four plant guards was installed, of which thirty-two were stationed at the Main Plant and thirty-two at the Fall Creek Ordnance Plant. As heretofore stated, respondent had theretofore employed only four watchmen, and with the exception of these four, none of the sixty-four persons installed as plant guards had previously been engaged in the service of respondent.

In Cincinnati, the War Department maintained a Continuous Security District Office, headed by A. C. Rasmussen, Lieutenant Colonel, Ordnance Department, as District Chief, and B. R. Wetenhall, Captain, Corps of Military Police, District Plant Guard Officer. There was no local resident Commanding Officer for the two plants of respondent, but such plants were included in a "group of plants" for which Lieutenant Scanlon of the Corps of Military Police was the Plant Guard Officer. Headquarters were maintained by him in Indianapolis for the training and discipline of plant guards of respondent, as well as those of other plants in a certain jurisdiction. At the Main Plant, the guards were in charge of Chief Johnston, and at the Ordnance Plant in charge of Chief Hann. Under each of these Chiefs were four guards designated as Lieutenants. Of these two Chiefs and eight Lieutenants, none were Army men.

In addition to Executive Order 8972 and the War Department's proclamation of July 2, 1942, heretofore quoted, there were issued by the War Department or some representative thereof a number of documents relative to the duties, obligations and rights of the members of the plant guard force. These documents in some respects also attempted to fix the obligations and rights of respondent.

Included in such documents is a War Department directive of March 17, 1943, referred to as Circular No. 15,[1] and "Plant Protection Data Binder" dated June 7, 1943, issued by the Continuous Security District Office of the War Department at Cincinnati. Other material documents include guard orders Nos. 1, 2 and 5, issued by the Cincinnati Office on May 10, 11 and 12, 1943, respectively.

Four witnesses were heard by the Board, namely, Gann and Richardson presented by the Union in the representation proceeding, and Johnston and Wood who testified in behalf of respondent. Johnston was Chief of the plant guard force, and Wood was respondent's personnel manager. In fact, the entire proof as to the relation which actually existed between the plant guard employes and respondent was furnished by these witnesses.

We shall now examine the Board's findings, upon which its order is predicated. It first quotes the first paragraph of the agreement (heretofore quoted in full), in which the guard recites: "* * * I, ----------, who have been or am about to be employed by ---------- as a guard at ----------* * *." There is nothing, however, in the Board's decision or findings as to what, if any, importance it attaches to the statement just quoted. Moreover, it would appear that this self-assertion would not constitute proof against respondent when contained in an agreement to which it was not a party. It is also pertinent to note that this form of agreement was furnished by the government and that an applicant could not obtain a guard position until it was signed. The "Plant Protection Data Binder," issued June 7, 1943 by the Cincinnati Office, provided: "If a guard refuses to sign the agreement he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as he is replaced, and in any event within a reasonable time." It is significant, and this the Board omitted to mention in its decision, that the plant guard in this agreement pledged his allegiance to the government and stated: "I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities * * * and will obey any orders issued in connection therewith by the President, as Commander-in-Chief * * * and by his duly authorized officers." It is further significant that in this agreement no mention is made of any allegiance owed to respondent, or any obligation to take orders therefrom.

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[1] Circular No. 15 has been printed by the Board as a supplement to its brief. It was not introduced in evidence, and respondent contends that it cannot be considered as proof in support of the Board's order. It is a public document of which, so we think, a court may take judicial notice. Standard Oil Co. v. Johnson, 316 U. S. 481, 483.

The material findings upon which the Board's order must rest are:

"The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America. According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works 'very closely' and 'cooperates' with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the 'necessary pay roll deductions' before paying them their wages.

"* * * It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act."

It is important in this connection to note the test which the Board utilized as a basis for its finding of the existence of the employer-employe relationship. The test includes four incidents: (1) the guards were paid by respondent; (2) they were hired by respondent; (3) they could be discharged by respondent; and (4) the control exercised by respondent.

The incident most strongly emphasized is that they were paid by respondent. Undoubtedly, this is the most important incident common to the employer-employe relationship. In the instant case, however, it is, when viewed in connection with the attending circumstances, largely minimized if not entirely obliterated. Payment of these guards by respondent, in fact their employment, was a requirement imposed by the government as a prerequisite to respondent's right to engage in the manufacture of war material. It had no optiton to pay or not pay; neither did it have any option to employ or not employ. Chief Johnston, when asked why the guards were paid by respondent when their orders were received from the military authorities, stated an incontrovertible fact: "They pay because the government makes them pay." It must be assumed, so we think, that respondent was reimbursed

by the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards. In reality, under such circumstances, as bearing upon the employer-employe relationship, we are of the view that it makes no difference whether they were paid by respondent or by the government.

It is also well to keep in mind that this guard force was born of the exigencies of war. None of them (with the exception of the four original watchmen) had theretofore been employed at respondent's plant. They were employed at the command of the government and the purpose of their employment was, as stated in the President's proclamation, "to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities," or, as stated in the agreement which the plant guard was required to sign with the government, "to protect war material, war premises, and war utilities against all enemies, foreign and domestic." In "Plant Protecton Data Binder" dated June 7, 1943, the mission of a guard force is stated to be twofold: (a) "to provide interior and exterior protection of the plant against sabotage and espionage and natural hazards," and (b) "to serve with the Army in providing the protection to the plant and its environs in emergency situations." Again, it is stated in this Binder, "The auxiliary military police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities." It appears certain not only that they were employed at the command of the government but that the services rendered by them were for the benefit of the government and the war effort. Any benefit accruing to respondent from their services was purely incidental to the primary purpose of their employment. Reliance upon payment under such circumstances is to embrace form and to ignore the realities of the situation.

The Board's finding that the guards "are hired by the respondent; that their discharge is ordinarily initiated by the respondent" is deceptive and, we think, without substantial support. It is true, as the Board found, that the guards "are interviewed for employment by the respondent." This is done by respondent's personnel officer when the applicant is required to fill out an application blank. This service on the part of respondent is also required by the government. At the time the application for employment is made, the applicant is expressly told: "It will not be effective without the approval of the United States government." True, after the application form had been executed, it was the custom temporarily to assign the applicant to plant control work. In the meantime, he was required by the government to sign the agreement with it, as heretofore related. This agreement stated: "The

United States is approving the employment * * *." Also, as heretofore suggested, if he refused to sign this agreement, he never became a member of the military police and his dismissal was required within a reasonable time.

The application and agreement were then transmitted to the military authorities at Cincinnati and such authorities made an investigation as to the capacity, integrity and patriotism of the applicant. Such authorities had the entire responsibility of determining the applicant's fitness, even to the extent of his physical fitness. If he was accepted by the military authorities, the signed agreement with the government was returned to the applicant, together with a Plant Guard Identification Card executed by Captain Wetenhall, District Plant Guard Officer.

This card certifies: "_____ has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States at _____ and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police." It is pertinent to note that this identification card which constitutes the guard's authority states in no uncertain terms that he has been enrolled "for service with the Army of the United States at _____," and, further, that he is subject "to Military Law for the duration of the War or until the earlier official termination by the War Department." Certainly this badge of authority contains not the slightest indication that the guard has been employed, hired or can be discharged by respondent.

The applicant is also furnished with the "Certificate of Enrollment," also signed by Captain Wetenhall. The phraseology of this certificate is the same as that of the identification card. There appears in the record one of these certificates in its executed form.[2]

Upon receiving the documents just referred to, the applicant is inducted by taking the oath of allegiance to the United States and the military. This oath includes an obligation to be subject to the

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[2]

United States of America

AUXILIARY MILITARY POLICE

Army of the United States

CERTIFICATE OF ENROLLMENT

This is to certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of_____ for service with the Army of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police. For the Commanding General, Fifth Service Command: Dated 29 June 1943.

Official:
B. E. WETENHALL,
Plant Guard Officer.

A. C. RASMUSSEN.

Articles of War. Any doubt as to when employment as a member of the military police commences is dispelled by a provision in guard order No. 3, which states: "Service will begin with the date that the plant guard was inducted * * *."

Plant Protection Data Binder dated June 7, 1943 provides:

"Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released by the War Department from his obligations. This will take place when competent military authority has approved of his dismissal or resignation or when he has been discharged without honor."

Again, it is provided in this same Binder:

"Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25."

Paragraph 25 provides:

"A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police."

From what we have shown, we think it is conclusively established that the authority to hire and discharge was solely the prerogative of the military. True, respondent was charged by the government with receiving the application for employment and in making a recommendation. This is the sole support, if it can be characterized as such, found in this record for the Board's finding that respondent was authorized to hire. Nor do we find any support for the Board's finding that "their discharge is ordinarily initiated by the respondent." The most which can be inferred is that respondent was permitted to recommend for discharge the same as it was required to recommend for hiring.

In making this analysis of respondent's right to hire and discharge, we must note the testimony of the witness Gann, which the Board stresses. It follows:

"Q. Who hires the guard?

"A. The personnel manager and the Chief.

"Q. Who has the authority to discharge you?

"A. The personnel manager or the Chief, I would think, of E. C. Atkins and Co."

These answers by the witness merely represented his opinion and, in addition, the "Chief" referred to was Chief Johnston who,

as will be shown, was entirely under the control of the military. Putting aside, however, such considerations, a reading of Gann's entire testimony shows conclusively that he was employed in the same manner as all other guards. This is illustrated by the following questions and answers:

"Q. From the 21st of January to the 27th of January you were an employee of E. C. Atkins and Company?

"A. Yes, sir.

"Q. They pay you whether you are their employee or whether you are a military policeman, but from January 27 you became a military policeman and were no longer an employee of E. C. Atkins and Company, as you had been up to January 27? Your status changed, did it not?

"A. That's right. I wasn't a member of the Auxiliary Military Police until I was inducted January 27."

The most favorable possible inference which can be drawn from the record is that respondent's authority, if it had any, with reference to hire and discharge was narrowly limited; in fact, as we have stated, we think it had no right in such matters except that of making recommendations to the military authorities.

This brings us to the matter of control. The Board's finding in this respect may be properly characterized as wholly impotent. It admitted that "respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards." It found, however, that it retained "a sufficient residual measure of control." What was intended by this language is not explained. The findings are silent as to any act or conduct on the part of respondent which evidences any control. The oral testimony shows without any contradiction that all members of the plant guard at the Main Plant took their orders and instructions from Chief Johnston. (We assume that the members of the force at the Ordnance Plant likewise took their instructions from Chief Hann; at any rate no question is raised but that the same situation existed at each plant.) The record shows with the same degree of certainty that Johnston took his instructions in toto from the military authorities. The only reference made by the Board in this respect was that Johnston "works very closely and cooperates with respondent's representatives." We should think that the exercise of ordinary common sense would require cooperation between the military and the management, but that fact certainly can form no basis for an inference that respondent exercised control. Especially is this so when the direct uncontradicted evidence is that all control was exercised by the Army. In this connection

it seems appropriate to relate certain portions of Johnston's testimony, and we do so in a footnote.[2]

The witness Gann, who testified that he was acquainted with all the duties of a guard, did not mention a single instance in which any duty was performed under the direction of respondent. On the other hand, he conceded that all duties were performed under orders received from the military. True, at one place in his testimony he was asked, "What, in general, do guards do?" and answered, "In general they guard the plant, supposed to obey all the general orders and specific orders which the company asks us to obey." Later he testified, in complete harmony with the other witnesses, that by general orders he meant those issued by the government pertaining to the service generally, and by special orders he meant those issued by the government which applied especially to respondent's plant. Then he was asked, "And when you said 'company orders' you did not mean the E. C. Atkins Company, but the military company to which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall?" And he answered, "Well, that's true."

That the military had control even to the minutest detail is shown by the testimony of Gann that special orders were received from the military as to the particular gate through which certain trucks should enter the plant. Also illustrative of this absolute control is the testimony of Johnston. In response to a question as to what he would do if he found Mr. Wood tampering with machinery or personnel, he answered:

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[2] "Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?
"A. Yes, naturally, I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.
"Q. You try to cooperate?
"A. I try to cooperate to the best of my ability and he does the same for me."
* * * * * * *
"Q. Now, how do you receive the general orders for your duties, from what source?
"A. General orders are received from Captain Wetenhall of the Fifth Service Command, Cincinnati."
* * * * * * *
"Q. (Referring to violation of military orders.) To whom do you report such violations? * * *
"A. I would report any violation, any serious violation, to Captain Wetenhall of Cincinnati.
"Q. And who instructs you to enforce orders?
"A. It would be the government."
* * * * * * *
"Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?
"A. No, they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only——
"Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?
"A. They would—that would be their orders—to follow mine, yes, sir.
"Q. You would have the same reaction towards such request of cooperation as you would if you had a specific order or a general order to the contrary from one of these superiors, is that right?
"A. Yes, sir. In those orders, it says, 'No conflicting interest.' It means a little different thing there but it means a lot besides. You would follow your Governmental orders first. They would have a much higher priority."

"Well, in a case like that, I would just turn him in, like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

"Q. Would you do the same with the president of the company?

"A. Yes, sir, I would.

"Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

"A. No, sir, there is no reason for that."

Johnston also identified three forms of passes which were issued to various employes, one for admission from the outside into the armor plate division, another for admission into the same division by an employe entering from another department, and another known as a gate pass, which permitted the entering and departure from a gate. No employe could enter a gate or a building until he had exhibited to a member of the guard the appropriate pass. Even an executive of the company could not enter a gate or go from one building to another without exhibiting his pass to a guard. These were military orders.

The statement in the Board's findings that respondent's personnel director "referred to the guards at the plants involved as respondent's employees" is also without substance. It is based solely upon the following questions and answers:

"Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

"A. Thirty-two.

"Q. When you say your employees, they are your employees only in the sense that you pay their wages, is that right?

"A. That is correct.

"Q. And you make the necessary pay roll deductions?

"A. That's right."

We think the conclusion is inescapable that the Board's findings based upon proof as to what actually happened is without substantial support. The proof shows without contradiction that respondent (1) paid the guards, but under the circumstances heretofore related, (2) had nothing to do with hiring and discharging other than making recommendations as to the former, and (3) exercised no control. True, the Board intimates that respondent failed to exercise the authority which it had, and stresses certain provisions in the documentary evidence which perhaps lend some color to the suggestion. We are of the view, however, that the employer-employe relationship must be determined from the actual situation as disclosed by the proof rather than from what the situation might have been. In this connection, we observe that the Board has called to our attention a number of its own decisions wherein it has decided that plant guards are employes. Some of

these cases we have studied, and we think the facts, especially as disclosed by the oral testimony on the matter of control exercised by the company, are quite different from those shown here. We are further of the view that this case must be decided on the facts contained in the record before us and not on the Board's decisions in other cases on different facts.

While we have heretofore made numerous references to the documentary proof, we think that it is entitled to further consideration. It is plain from the record that both respondent and the guard members formulated their activities largely upon the instructions contained in guard orders 1, 2 and 3. It is doubtful, at any rate there is nothing in the record to disclose, that they were even aware of some of the documents which the Board now relies upon and especially Circular No. 15, issued by the War Department March 17, 1943. (This Circular, as heretofore noted, was not introduced in evidence.) The guard orders were posted in various places at the two plants and were the orders under which the guards actually worked. The importance attached to these orders is shown from the fact that they were blown up in photostatic replicas, "enlarged four times," that the plant guards could familiarize themselves with their provisions.

Guard order No. 1 had underlined for particular emphasis the following sentence: "No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission." There is not a word in such order which intimates other than that the guard members are entirely under the jurisdiction and authority of the military. They are told that they are subject to the Articles of War and court martial, that a commissioned officer of the United States Army has been placed in command, that the mission of the guard force is to provide protection for the plant, that a member is available for military use whether on or off duty, that protection of the plant and its production is essential to the successful prosecution of the war, that service begins with the date he is inducted into the military police, and that no member may resign without the written approval of the District Plant Guard Officer.

Guard order No. 2 states eighteen general orders which the member is required to be prepared to recite when directed by his superior officers. A comparison of these guard orders with the Basic Field Manual or Solders' Handbook, edition of July 23, 1941, issued by the War Department, shows that the duties, responsibility and discipline of a plant guard member is as strict as that imposed in any branch of the military service.

Guard order No. 3 authorizes the wearing of service stripes in accordance with Army regulations for services faithfully performed, and provides that "service will begin with the date that

the plant guard was inducted into the Auxiliary Military Police."

The Board places strong reliance upon certain provisions contained in Circular No. 15 of the War Department, dated March 17, 1942. This document occupies twenty full pages of the Board's brief. A cursory reading of certain statements contained in this document seem to indicate that respondent had some measure of authority over members of the plant guard. Even if this be so, however, as we have heretofore shown, all authority and control was taken over by the Army and none was exercised by respondent. Furthermore, we are of the view that this document when considered as a whole, and especially when considered in connection with other documents to which we have referred, leaves little room for the contention that respondent had the right but failed to exercise control.

We shall refer to a few of the more striking statements relied upon by the Board. The document states:

"Nothing in this circular will be construed as modifying the responsibility of plant management 'for providing adequate protection at all times against all hazards.'"

Certainly this statement constitutes no proof that respondent actually exercised any control of the plant guards or even that it had any right to exercise such control. Moreover, immediately following the statement just quoted, the plant guard officer is authorized to take appropriate action to correct any defective or inadequate performance "by the guard force of its ordinary protective duties." The document states:

"The mission of this guard force is to provide protection for this plant. In addition to its normal functions the force or any member thereof whether on or off duty is available for military use in any emergency * * *. No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission."

We are unable to discern any assistance in this statement for the Board's theory. It appears certain that the protection for the plant referred to is that which the government requires in behalf of the war effort. The statement recognizes that whether services rendered be normal or of an emergency character, they are rendered as members of the force. Another statement relied upon: "The Auxiliary Military Police will continue to function as formerly * * *. Control, therefore, will be exercised as heretofore through the plant management." This statement is also meaningless, in view of the fact that no plant guard system had theretofore been in existence at respondent's plant. Furthermore, as already shown, actual control of the guard force was taken over by the military.

Another provision emphasized by the Board is:

"Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal, all remain primarily a matter between the guards and the plant managements."

The interpretation which the Board places upon this statement is immediately dispelled by the sentence which follows:

"A member of the Auxiliary Military Police may not be employed or dismissed and may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant's guard force would be impaired and declines to give his approval thereto."

How it can be said that respondent had the right to hire and dismiss when that prerogative was placed squarely in the Army is a theory we are unable to follow. In this connection, it is pertinent to note that this document also provides:

"The Auxiliary Military Police, as agents of the Federal Government, will not be subject to any state or municipal requirement which conflicts with their war-time duties."

We now refer to certain provisions of Circular No. 15 which really constitute the backbone of the Board's argument that members of the plant guard are employes of respondent and entitled to collective bargaining. It is provided:

"The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employers' liability provisions remain unaffected."

Also:

"Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. * * * If any proposed labor agreement is being considered which involves plant protection employees who are or may become members of the Auxiliary Military Police, the contracting parties will be urged to insert in such agreement a provision substantially as follows: 'It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military organization of the plant guard forces * * * and that nothing contained in this agreement will be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the company guard force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police'."

We suppose that these provisions represent an effort on the part of the War Department to preserve, in the instant situation to create, the status of employer-employe relationship between members of the plant guard and respondent. It attempted to counteract the emasculating effect which its orders and directives had had upon the ordinary incidents attending such relationship. In our judgment, these provisions weaken rather than strengthen the position of the Board. The War Department, acting under the authority of the President's proclamation, created this guard force. In doing so, it stripped the respondent and denuded members of the force of all the attributes common to the employer-employe relationship. Having created this situation, we think it was without authority to revitalize that which it had destroyed.

These provisions may indicate a willingness or even a desire on the part of the War Department that plant guards retain their status as employes, but even so, such desire cannot determine or alter the legal rights of the parties. Furthermore, the right to bargain is limited, if not destroyed, by the condition "but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." This gratuity on the part of the War Department is on a par with that extended to a boy when he is given permission to swim, providing he stays away from the water. The requirement that "for the duration of the war" any agreement between plant guards and the plant must be subject to the directives of the War Department and will not interfere in any way with the duties and responsibilities imposed by the War Department is, in effect, the postponement of the right to bargain, as contemplated by the Act, until some future time.

The Board found, apparently in response to a contention made by respondent, that the plant guards are not employes of the United States of America. From this it argues that because they are not employes of the government they must be those of respondent. We are not impressed with this argument. Neither do we think it is necessary for us to determine the technical status which they occupy with the federal government. That they sustain a relationship closely akin to that of a soldier cannot be doubted. The Certificate of Enrollment issued by the War Department provides that the applicant "has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of _____ for service with the Army of the United States at E. C. Atkins and Company." Thus they are enrolled "for service with the Army." Moreover, the War Department itself in Circular No. 16 as already noted, designates them as "agents of the federal government." Irrespective, however, of their technical classification, there can be no doubt but that they are representatives of the federal government for the duration of the war and engaged in a service necessary

for its successful prosecution. In our view, the relation which they sustain to the federal government is wholly incompatible with the theory that they are employes of respondent within the meaning and purpose of the National Labor Relations Act. We hold accordingly.

The further question, closely related to the one we have just decided, is whether the Board's order requiring respondent to bargain with the Union should be enforced. In considering this question, we assume, contrary to our holding, that members of the military guard are employes of respondent.

The purposes and policy of the National Labor Relations Act are well known and need not here be dwelt upon. The Board must comply with the requirement "that the unit selected must be one to effectuate the policy of the Act, the policy of efficient collective bargaining." The capacity in which the Board acts is succinctly stated in National Licorice Co. v. N. L. R. B., 309 U. S. 350, 362:

"The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the 'exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. * * *'."

See also Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261, 265.

There is no room for argument but that any field open for bargaining between the Union and respondent is an extremely limited one. This must have been fully recognized by the War Department when it included in Circular No. 15 heretofore discussed the admonition that "no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." As already pointed out, the Act contemplates "full freedom" on the part of the employes, with the right of "efficient collective bargaining." It is difficult to understand, in view of the policy stated, how the right to bargain, not fully and efficiently but only in some limited fashion, can be contemplated by the Act.

A more cogent reason, however, why enforcement should not be allowed is that to do so would be or is likely to be inimical to the public welfare. The Board in its order entirely ignores the unusual status occupied by members of the plant guard by reason of their enrollment for service with the military. As heretofore shown, they are largely if not entirely under the control and direction of the War Department. They wear the uniform of a soldier, owe the same allegiance, receive their authority and com-

mands from the same source, are enlisted for the duration of the war for service with the Army, and are engaged in the performance of a service essential to the successful prosecution of the war. Pertinent is the statement in Southern Steamship Co. v. N. L. R. B., 316 U. S. 31, 47:

"It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."

In the recent cases of N. L. R. B. v. Jones and Laughlin Steel Corp. and N. L. R. B. v. Federal Motor Truck Co., decided December 8, 1944 (Circuit Court of Appeals, 6th Circuit), the court in denying enforcement orders under a situation similar to that of the instant case said:

"The national welfare is of supreme importance and especially is this true in time of war. The evidence reflects the deep concern of the Government for the maintenance and protection of respondents' plants and for the integrity and volume of their products. * * * It must be kept in mind that in time of national peril, the preservation, protection and promotion of the national welfare is the paramount objective; and the Board must select bargaining agents with this in view."

We agree with the statement just quoted. Nothing should be permitted which will interfere in any degree or to any extent with the obligation which these guards have with the military. Membership in a union with the right to bargain might, in fact is likely to, do that very thing. To so state is not to cast any reflection upon the patriotism of the guard members. It is merely a recognition of that which is a matter of common knowledge.

In concluding, it is pertinent to observe that the enforcement of this order would be little more than an idle gesture. It is difficult to see how it could be of any practical benefit, and it might do immeasurable harm to the war effort and consequently to the public interest. The petition for enforcement is denied.

KERNER, Circuit Judge, concurs in the result.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And on the same day, to wit: On the twenty-seventh day of February, 1945, the following further proceedings were had and entered of record, to wit:

TUESDAY, February 27, 1945.

Court met pursuant to adjournment.
Before: Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. J. EARL MAJOR, Circuit Judge; Hon. OTTO KERNER, Circuit Judge.

8669

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

E. C. ATKINS AND COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition of the National Labor Relations Board for enforcement of its order entered in this cause on May 30, 1944, be, and the same is hereby, denied.

United States Circuit Court of Appeals For the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the Opinion filed on the twenty-seventh day of February 1945, and Judgment entered on the same day, in Cause No. 8669, National Labor Relations Board, Petitioner, vs. E. C. Atkins and Company, Respondent, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this tenth day of April A. D. 1945.

[SEAL]

KENNETH J. CARRICK,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1945